

Hence, the Court should be wary of the direct and collateral consequences of attaching the Sixth Amendment right to counsel to preindictment pleas, which would diminish the ex ante clarity of rights afforded by the bright-line rule and increase the administrative burden on the government without added benefit. Furthermore, moving the bright-line attachment rule to include preindictment pleas may pave the path for criminal defendants to argue for an extension of the same right to other preindictment proceedings that this Court has repeatedly refused to recognize as points of attachment.

3. Other constitutional safeguards outside the Sixth Amendment right to counsel jurisprudence exist to protect the rights of defendants.

The Sixth Amendment right to counsel provides a floor, not a ceiling, protection for the accused, not whenever they may benefit from a lawyer's advice. See Burbine, 475 U.S. at 429-30; see also United States v. Larkin, 978 F.2d 964, 969 (7th Cir. 1992) (the fact that a lawyer's service may be useful in preventing hazards of eyewitness testimonies during preindictment lineups does not justify a constitutional right to counsel). In Burbine, a defendant waived his Fifth Amendment right to counsel and made inculpatory statements during custodial interrogation in the absence of counsel. Id. at 415-16. Although the Court recognized that a confession elicited during police questioning may often seal a suspect's fate, such

concern did not justify a constitutional right to counsel. Id. at 431-32.

Repeatedly, the Court has “declined to depart from its traditional interpretation of the Sixth Amendment right to counsel” in response to policy arguments because other constitutional safeguards protect defendants during pretrial proceedings. See Gouveia, 467 U.S. at 192 (upholding that statute of limitations and Fifth Amendment due process rights afford protection to defendants against the government that deliberately delays formal charges); see also Kirby, 406 U.S. at 691 (explaining that the due process requirements under the Fifth and Fourteenth Amendments forbid unnecessarily suggestive lineups). Moreover, in Miranda, the Court established the right to counsel for suspects under custodial interrogation, requiring the police to explain the right to remain silent and have counsel before initiating any questioning. 384 U.S. at 469-73; see U.S. Const. Amend. V.

In any event, legislatures are free to adopt further protection measures for defendants in addition to well-established constitutional rights. See 18 U.S.C. § 3599(a)(2); see, e.g., Martel v. Claire, 565 U.S. 648, 661-62 (2012) (creating a limited statutory right to counsel in habeas corpus proceedings). In particular to the Sixth Amendment jurisprudence, Congress has legislated beyond the constitutional

right to a speedy trial by enacting the Speedy Trial Act of 1974, which requires specific time limits for completing various stages of a criminal prosecution. See 18 U.S.C. § 3161.

In sum, the policy argument that the Sixth Amendment right to counsel should extend to preindictment pleas because it can be valuable is precisely the line of argument the Court rejected in Burbine. The Sixth Amendment right to counsel guarantees a minimum, but definitive protection for defendants once they are formally charged. Prior to attachment, other constitutional and procedural safeguards protect defendants to ensure the proper administration of justice, with room for legislatures to intervene and provide further protections as they see fit.

C. Robertson's Right to Counsel Did Not Attach at his Preindictment Plea Stage as a Matter of Law Because No Judicial Proceedings Had Commenced Against Him According to the Bright-Line Attachment Rule.

A target letter does not turn a subject of an investigation into an "accused" within the meaning of the Sixth Amendment. United States v. Olson, 988 F.3d 1158, 1163 (9th Cir. 2021); Hayes, 231 F.3d at 674-75 (held that no attachment occurred when a defendant received a target letter and consented to an interview by federal agents). In Olson, a defendant's right to counsel did not attach according to the bright-line attachment rule when he received a target letter that invited him to have

his counsel contact the government if he was 'interested in resolving this matter short of an Indictment.' Id. at 1160-61.

A subject of an investigation does not become an accused within the meaning of the Sixth Amendment when the government offers preindictment pleas. See, e.g., Turner, 885 F.3d at 955; see also Moody, 206 F.3d at 614. In Moody, a suspect voluntarily approached and cooperated with the government after the government successfully searched his home and business under valid warrants. 206 F.3d at 611. He volunteered information about the roles of other targets, and the government offered him a preindictment plea, which he later rejected at the advice of his attorney. Id. However, his Sixth Amendment right to counsel did not attach at a preindictment plea stage because he was an unindicted subject of an investigation. Id. at 614.

Other circuits, such as the First, Third, and Seventh, also have adhered to the bright-line attachment rule in various preindictment contexts. Roberts v. Maine, 48 F.3d 1287, 1291 (1st Cir. 1995) (held that a suspect's right to counsel did not attach at the time he refused to take the blood alcohol test because no formal charges had been brought); Matteo v. Superintendent, SCI Albion, 171 F.3d 877, 892-93 (3d Cir. 1999) (held that the right to counsel attached at a preliminary arraignment proceeding); Larkin, 978 F.2d at 967 (no Sixth Amendment right to counsel at preindictment lineups).

Here, Robertson did not have a Sixth Amendment right to counsel when the government offered a preindictment plea because no formal prosecution had been initiated against him. Like the defendant in Olson who did not turn into an accused when he received the target letter, Robertson did not turn into an “accused” within the meaning of the Sixth Amendment. Furthermore, like the defendant in Moody whose right to counsel did not attach when he received the preindictment offer, Robertson’s Sixth Amendment right to counsel did not attach during his preindictment plea negotiation. Preindictment pleas do not trigger the same right to counsel as during postindictment pleas without the commencement of prosecution. Extending the Sixth Amendment right to counsel to the preindictment plea stage only benefits defendants like Robertson who was ready to take a chance and wait until he could further evaluate the government’s case against him, only to regret having rejected a favorable preindictment offer. Although preindictment pleas can be an efficient tool, conserving prosecutorial resources and allowing defendants who admit their guilt to receive favorable sentences, the government may be discouraged from offering preindictment pleas if they can open doors to ineffective assistance claims that may end up benefitting defendants who purposely decline the offer in the hopes of avoiding convictions.

Applicant Details

First Name **Nanxi**
 Last Name **You**
 Citizenship Status **U. S. Citizen**
 Email Address n.you@wustl.edu
 Address

Address**Street****100 N Kingshighway Blvd, Apt 1103****City****St. Louis****State/Territory****Missouri****Zip****63108****Country****United States**

Contact Phone
 Number **6462728350**

Applicant Education

BA/BS From **Columbia University**
 Date of BA/BS **May 2018**
 JD/LLB From **Washington University School of Law**
http://www.nalplawsonline.org/ndlsdir_search_results.asp?lscd=42604&yr=2014
 Date of JD/LLB **May 1, 2024**
 Class Rank **10%**
 Law Review/
 Journal **Yes**
 Journal(s) **Washington University Law Review**
 Moot Court
 Experience **Yes**
 Moot Court
 Name(s) **Wiley Rutledge Moot Court Competition**

Bar Admission

Prior Judicial Experience

Judicial
Internships/ **No**
Externships
Post-graduate
Judicial Law **No**
Clerk

Specialized Work Experience

Recommenders

Ron, Levin
rlevin@wustl.edu
Shill, Gregory
gregory-shill@uiowa.edu
Lewis, Jo Ellen
lewisj@wustl.edu
314-935-4684

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Nanxi You

n.you@wustl.edu | 646-272-8350

School:

100 N Kingshighway Blvd. Apt. 1103
St. Louis, MO 63108

Permanent:

82-19 Grenfell Street
Kew Gardens, NY 11415

The Honorable Jamar K. Walker
U.S. District Court for the Eastern District of Virginia
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510

Dear Judge Walker:

I am writing to apply for a clerkship in your chambers, either beginning in 2024 or for your next available position. I am a rising third-year law student at Washington University School of Law, where I am an Articles Editor for the *Washington University Law Review*. I plan to practice in my home state of New York after I graduate and look forward to returning to the East Coast.

Enclosed please find my résumé, transcripts, and writing samples. The first writing sample is based on a brief I submitted for the Wiley Rutledge Moot Court Competition. The second writing sample is a case comment I completed for the Write-On Competition. The following individuals are submitting letters of recommendation separately.

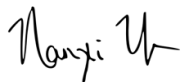
Professor Ronald M. Levin
Washington University
School of Law
rlevin@wustl.edu
(314) 935-6490

Professor Jo Ellen Dardick Lewis
Washington University
School of Law
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(314) 935-4684

Professor Gregory H. Shill
University of Iowa College of Law
(Spring 2022 Visiting Professor)
gregory-shill@uiowa.edu
(319) 335-9057

I would welcome any opportunity to interview with you. Thank you for your time and consideration.

Sincerely,



Nanxi You

Nanxi Youn.you@wustl.edu | 646-272-8350**School:**100 N Kingshighway Blvd. Apt. 1103
St. Louis, MO 63108**Permanent:**82-19 Grenfell Street
Kew Gardens, NY 11415**EDUCATION****Washington University School of Law**

St. Louis, MO

Juris Doctor Candidate | GPA: 3.84 (Top 10%)

May 2024

Honors & Activities: Dean's List (Spring 2022, Fall 2022, Spring 2023)
Highest grade in class for Civil Procedure (Spring 2022)
Washington University Law Review, Vol. 101, Articles Editor
Scholar in Law Award (merit-based scholarship)
Wiley Rutledge Moot Court Competition

Columbia University

New York, NY

Bachelor of Arts in Economics–Political Science | GPA: 3.62

May 2018

Honors & Activities: Dean's List (4 Semesters)
Graduate School of Journalism, *Administrative Assistant*
Study Abroad, London School of Economics and Political Science

EXPERIENCE**Davis Polk & Wardwell LLP**

New York, NY

Summer Associate

May 2023 – Present

- Researched case law and drafted legal memoranda in support of litigation and pro bono matters

Legal Assistant

June 2018 – January 2021

- Drafted and reviewed financial offering documents for client-specific structured investment product issuances linked to equities, rates, indices, commodities, and other market measures
- Facilitated communications between clients and attorneys to prepare and distribute material in a timely manner
- Managed time-sensitive regulatory filings with the Securities and Exchange Commission and attended to client requests related to each filing

Vedder Price P.C.

New York, NY

Summer Associate (Return Offer Extended)

May 2022 – July 2022

- Worked closely with shareholders specializing in transportation finance to draft and review contracts in connection with aircraft transactions
- Assisted in preparation of transactional documents for the Finance & Secured Lending, Mergers & Acquisitions, and Capital Markets groups

Sunset Park Family Health Center at NYU Langone

New York, NY

Early Learning Specialist, AmeriCorps Member

January 2021 – July 2021

- Provided early literacy support and child development guidance to 15 Mandarin-speaking families and children through virtual home visits
- Modeled positive verbal interactions and demonstrated language building strategies with books and toys
- Conducted evaluations of each family's progress in the program and maintained detailed records of home visits

Penn, Schoen, & Berland Associates

New York, NY

Market Research Intern

September 2017 – December 2017

- Assisted project team in quality control reviews for data accuracy in presentations and surveys to eliminate bias and ensure statistical significance
- Collaborated with research and survey teams on questionnaire development for various clients
- Conducted research on client's company and industry, including financials, corporate leaders, and products

SKILLS, INTERESTS & COMMUNITY ENGAGEMENTABA Antitrust Section, *Law Student Ambassador* (September 2022 – Present)ABA Antitrust Section Legislation Monitoring Project, *Volunteer* (October 2020 – May 2021)

Chinese (Fluent) | Oil Painting, Go, Crossword puzzles, Family Karaoke, YouTube cooking videos

Nanxi You

n.you@wustl.edu | 646-272-8350

School:

100 N Kingshighway Blvd. Apt. 1103
St. Louis, MO 63108

Permanent:

82-19 Grenfell Street
Kew Gardens, NY 11415

Washington University School of Law

Unofficial Grade Sheet

Fall Semester 2021

| Course Title | Instructor | Credit Hours | Grade |
|--|------------|--------------|-----------|
| Legal Practice I: Objective Analysis and Reasoning | Lewis | 2.00 | 3.88 (A) |
| Property | D'Onfro | 4.00 | 3.52 (B+) |
| Torts | Norwood | 4.00 | 3.64 (A-) |
| Constitutional Law I | Osgood | 4.00 | 3.70 (A-) |

Fall Semester GPA: 3.66

Cumulative GPA: 3.66

Spring Semester 2022

| Course Title | Instructor | Credit Hours | Grade |
|---------------------------------|------------|--------------|-----------|
| Legal Research Methodologies II | | 1.00 | (Pass) |
| Legal Practice II: Advocacy | Lewis | 2.00 | 3.88 (A) |
| Contracts | Shill | 4.00 | 3.88 (A) |
| Criminal Law | Diamantis | 4.00 | 3.76 (A) |
| Civil Procedure | Levin | 4.00 | 4.24 (A+) |
| Negotiation | Reeves | 1.00 | (Pass) |

Spring Semester GPA: 3.95 (Dean's List)

Cumulative GPA: 3.80

**This grade sheet has been self-prepared by the above-named student. I affirm the accuracy of all information contained herein. I will bring a copy of an unofficial and official transcript at the time of any scheduled interview or forward one upon request.*

For any questions, please feel free to contact me using the information listed above. Thank you.

Fall Semester 2022

| Course Title | Instructor | Credit Hours | Grade |
|----------------------------------|-------------------|--------------|-----------|
| Evidence | Rosen | 3.00 | 3.76 (A) |
| Federal Courts | Hollander-Blumoff | 4.00 | 4.18 (A+) |
| Mediation Theory and Practice | Kuchta-Miller | 3.00 | 3.58 (A-) |
| Pretrial Practice and Settlement | Walsh | 3.00 | 3.94 (HP) |
| Law Review | | 1.00 | |
| Moot Court | | 1.00 | |

Fall Semester GPA: **3.89 (Dean's List)**

Cumulative GPA: **3.83**

Spring Semester 2023

| Course Title | Instructor | Credit Hours | Grade |
|---|----------------|--------------|-----------|
| Administrative Law | Levin | 3.00 | 4.00 (A+) |
| Legal Profession | Joy | 3.00 | 3.52 (B+) |
| Antitrust | Drobak | 3.00 | 4.06 (A+) |
| International Money Laundering, Corruption, and Terrorism | Fagan/Delworth | 3.00 | 3.88 (A) |
| Topics in Health Insurance Law and Regulation | Schwarcz | 1.00 | 3.76 (A) |
| Law Review | | 1.00 | |

Spring Semester GPA: **3.86 (Dean's List)**

Cumulative GPA: **3.84**

**This grade sheet has been self-prepared by the above-named student. I affirm the accuracy of all information contained herein. I will bring a copy of an unofficial and official transcript at the time of any scheduled interview or forward one upon request.*

For any questions, please feel free to contact me using the information listed above. Thank you.

COLUMBIA UNIVERSITY IN THE CITY OF NEW YORK

NAME: Nanxi You
 SSN#: XXX-XX-3659
 SCHOOL: COLUMBIA COLLEGE

DEGREE(S) AWARDED: Bachelor of Arts
 DATE AWARDED: May 16, 2018

MAJOR: ECONOMICS-POLITICAL SCIENCE

PROGRAM TITLE: ECONOMICS-POLITICAL SCIENCE

| SUBJECT COURSE TITLE NUMBER | POINTS | GRADE | SUBJECT COURSE TITLE NUMBER | POINTS | GRADE |
|---------------------------------------|--------|-------|---|--------|-------|
| Fall 2014 | | | Fall 2016 | | |
| HUMA C 1001 EURPN LIT-PHILOS MASTERPI | 4.00 | A- | STAB CC 0002 FULL-TIME STUDY ABROAD PR | 15.50 | |
| HUMA W 1121 MASTERPIECES OF WESTERN A | 3.00 | A | | | |
| MATH V 1101 CALCULUS I | 3.00 | A | | | |
| PHED C 1001 PHYSICAL ED:PILATES/SCULP | 1.00 | P | Spring 2017 | | |
| SCNC C 1000 FRONTIERS OF SCIENCE | 4.00 | B+ | | | |
| SCNC C 1100 FRONTIERS OF SCIENCE-DISC | 0.00 | | STAB C 0002 FULL-TIME STUDY ABROAD PR | 15.50 | |
| SOCI W 3324 GLOBAL URBANISM | 3.00 | A- | | | |
| HONORS: DEAN'S LIST | | | Fall 2017 | | |
| Spring 2015 | | | ECON GU 4370 POLITICAL ECONOMY | 3.00 | A- |
| ECON W 3213 INTERMEDIATE MACROECONOMI | 3.00 | B+ | HRTS GU 4900 UN HUMAN RIGHTS BODIES | 4.00 | A |
| ENGL C 1013 UNIVERSITY WRITING: SUST | 3.00 | B | HUMA UN 1123 MASTERPIECES OF WESTERN M | 3.00 | A |
| HUMA C 1002 EURPN LIT-PHILOS MASTRPIE | 4.00 | A- | POLS UN 3961 INEQUALITY WITHIN&BTWN NA | 4.00 | A |
| MATH V 1201 CALCULUS III | 3.00 | B- | HONORS: DEAN'S LIST | | |
| POLS W 4871 CHINESE FOREIGN POLICY | 4.00 | A- | | | |
| Fall 2015 | | | Spring 2018 | | |
| COCI C 1101 CONTEMP WESTERN CIVILIZAT | 4.00 | B- | ECPS GU 4921 POLITICAL ECONOMY IN THE | 4.00 | A- |
| ECON V 2029 FED CHALLENGE WORKSHOP | 1.00 | P | HRTS GU 4500 SOCIO-ECONOMIC RIGHTS:SEL | 3.00 | A |
| ECON W 3211 INTERMEDIATE MICROECONOMI | 3.00 | B | PHED UN 1002 PHYSICAL ED: CARDIO FITNE | 1.00 | P |
| POLS V 1601 INTERNATIONAL POLITICS | 4.00 | B+ | POLS UN 1501 INTRO TO COMPARATIVE POLI | 4.00 | A |
| POLS V 1611 INT'L POLITICS - DISC | 0.00 | | POLS UN 1511 INTRO-COMP POLITICS-DISC | 0.00 | |
| POLS W 4461 LATIN AMERICAN POLITICS | 4.00 | A- | POLS UN 3962 POL ECON-TRADE, AID & INV | 4.00 | A |
| POLS W 4466 LATIN AMER POLITICS-DISC | 0.00 | | HONORS: DEAN'S LIST | | |
| STAT W 1211 INTRODUCTION TO STATISTIC | 3.00 | B+ | | | |
| Spring 2016 | | | REMARKS | | |
| CLME W 4031 CINEMA & SOC IN ASIA & | 4.00 | A | Cumulative GPA: 3.616 | | |
| COCI C 1102 CONTEMP WESTRN CIVILIZATI | 4.00 | A- | 10.00 Credits Transferred from College Bd: Advanced Placement | | |
| ECON V 3025 FINANCIAL ECONOMICS | 3.00 | A- | 32.00 Credits Transferred from London Sch of Econ & Poli Sci | | |
| ECON W 3412 INTRODUCTION TO ECONOMETR | 3.00 | A- | | | |
| PSYC W 1001 THE SCIENCE OF PSYCHOLOGY | 3.00 | A- | | | |
| HONORS: DEAN'S LIST | | | | | |

This official transcript was produced on
 FEBRUARY 12, 2020.



SEAL OF COLUMBIA UNIVERSITY
 IN THE CITY OF NEW YORK

Barry S. Kane

Barry S. Kane
 Associate Vice President and University Registrar

TO VERIFY AUTHENTICITY OF DOCUMENT, THE BLUE STRIP BELOW CONTAINS HEAT SENSITIVE INK WHICH DISAPPEARS UPON TOUCH

OFFICE OF THE UNIVERSITY REGISTRAR
STUDENT SERVICE CENTER
1140 AMSTERDAM AVENUE
205 KENT HALL, MAIL CODE 9202
NEW YORK, NEW YORK 10027
(212) 854-4400



SEAL OF COLUMBIA UNIVERSITY
IN THE CITY OF NEW YORK

Columbia College, Engineering and Applied Science, General Studies, Graduate School of Arts and Sciences, International and Public Affairs, Library Service, Human Nutrition, Nursing, Occupational Therapy, Physical Therapy, Professional Studies, Special Studies Program, Summer Session
A, B, C, D, F (excellent, good, fair, poor, failing). NOTE: Plus and minus signs and the grades of **P** (pass) and **HP** (high pass) are used in some schools. The grade of **D** is not used in Graduate Nursing, Occupational Therapy, and Physical Therapy.

American Language Program, Center for Psychoanalytic Training and Research, Journalism

P (pass), **F** (failing). Grades of **A, B, C, D, P** (pass), **F** (failing) — used for some offerings from the American Language Program Spring 2009 and thereafter.

Architecture

HP (high pass), **P** (pass), **LP** (low pass), **F** (failing), and **A, B, C, D, F** — used June 1991 and thereafter **P** (pass), **F** (failing) — used prior to June 1991.

Arts

P (pass), **LP** (low pass), **F** (fail), **H** (honors) used prior to June 2015.

Business

H (honors), **HP** (high pass), **P1** (pass), **LP** (low pass), **P** (unweighted pass), **F** (failing); plus (+) and minus (-) used for **H**, **HP** and **P1** grades Summer 2010 and thereafter.

College of Physicians and Surgeons

H (honors), **HP** (high pass), **P** (pass), **F** (failing).

College of Dental Medicine

H (honors), **P** (pass), **F** (failing).

Law

A through **C** [plus (+) and minus (-) with **A** and **B** only], **CR** (credit - equivalent to passing), **F** (failing) is used beginning with the class which entered Fall 1994. Some offerings are graded by **HP** (high pass), **P** (pass), **LP** (low pass), **F** (failing). **W** (withdrawn) signifies that the student was permitted to drop a course, for which he or she had been officially registered, after the close of the Law School's official Change of Program (add/drop) period. It carries no connotation of quality of student performance, nor is it considered in the calculation of academic honors.

E (excellent), **VG** (very good), **G** (good), **P** (pass), **U** (unsatisfactory), **CR** (credit) used from 1970 through the class which entered in Fall 1993.

Any student in the Law School's Juris Doctor program may, at any time, request that he or she be graded on the basis of Credit-Fail. In such event, the student's performance in every offering is graded in accordance with the standards outlined in the school's bulletin, but recorded on the transcript as Credit-Fail. A student electing the Credit-Fail option may revoke it at any time prior to graduation and receive or request a copy of his or her transcript with grades recorded in accordance with the policy outlined in the school bulletin. In all cases, the transcript received or requested by the student shall show, on a cumulative basis, all of the grades of the student presented in single format — i.e., all grades shall be in accordance with those set forth in the school bulletin, or all grades shall be stated as Credit or Fail.

Public Health

A, B, C, D, F - used Summer 1985 and thereafter. **H** (honors), **P** (pass), **F** (failing) — used prior to Summer 1985.

Social Work

E (excellent), **VG** (very good), **G** (good), **MP** (minimum pass), **F** (failing).

A through **C** is used beginning with the class which entered Fall 1997. Plus signs used with **B** and **C** only, while minus signs are used with all letter grades. The grade of **P** (pass) is given only for select classes.

OTHER GRADES USED IN THE UNIVERSITY

AB = Excused absence from final examination.

AR = Administrative Referral awarded temporarily if a final grade cannot be determined without additional information.

AU = Audit (auditing division only).

CP = Credit Pending. Assigned in graduate courses which regularly involve research projects extending beyond the end of the term. Until such time as a passing or failing grade is assigned, satisfactory progress is implied.

F* = Course dropped unofficially.

IN = Work Incomplete.

MU = Make-Up. Student has the privilege of taking a second final examination.

R = For the Business School: Indicates satisfactory completion of courses taken as part of an exchange program and earns academic credit.

R = For Columbia College: The grade given for course taken for no academic credit, or notation given for internship.

R = For the Graduate School of Arts and Sciences: By prior agreement, only a portion of total course work completed. Program determines academic credit.

R = For the School of International and Public Affairs: The grade given for a course taken for no academic credit.

UW = Unofficial Withdrawal.

UW = For the College of Physicians and Surgeons: Indicates significant attempted coursework which the student does not have the opportunity to complete as listed due to required repetition or withdrawal.

W = Withdrew from course.

YC = Year Course. Assigned at the end of the first term of a year course. A single grade for the entire course is given upon completion of the second term. Until such time as a passing or failing grade is assigned, satisfactory progress is implied.

OTHER INFORMATION

NOTE: All students who cross-register into other schools of the University are graded in the **A, B, C, D, F** grading system regardless of the grading system of their own school, except in the schools of Arts (prior to Spring 1993) and in Journalism (prior to Autumn 1992), in which the grades of **P** (pass) and **F** (failing) were assigned. Notations at the end of a term provide documentation of the type of separation from the University.

% of **A** Effective fall 1996: Transcripts of Columbia College students show the percentage of grades in the **A (A+, A, A-)** range in all classes with at least 12 grades, the mark of **R** excluded. Calculations are taken at two points in time, three weeks after the last final examination of the term and three weeks after the last final of the next term. Once taken, the percentage is final even if grades change or if grades are submitted after the calculation. For additional information about the grading policy of the Faculty of Columbia College, consult the College Bulletin.

KEY TO COURSE LISTINGS

A course listing consists of an area, a capital letter(s) (denotes school bulletin) and the four digit course number (see below).

The **capital letter** indicates the University school, division, or affiliate offering the course:

| | |
|-----------|--|
| A | Graduate School of Architecture, Planning, and Preservation |
| B | School of Business |
| BC | Barnard College |
| C | Columbia College |
| D | College of Dental Medicine |
| E | School of Engineering and Applied Science |
| F | School of General Studies |
| G | Graduate School of Arts and Sciences |
| H | Reid Hall (Paris) |
| J | Graduate School of Journalism |
| K | School of Library Services/Continuing Education (effective Fall 2002) |
| L | School of Law |
| M | College of Physicians and Surgeons, Institute of Human Nutrition, Program in Occupational Therapy, Program in Physical Therapy, Psychoanalytical Training and Research |
| N | School of Nursing |

| | |
|--------------|--|
| O | Other Universities or Affiliates/Auditing |
| P | School of Public Health |
| Q | Computer Technology/Applications |
| R | School of the Arts |
| S | Summer Session |
| T | School of Social Work |
| TA-TZ | Teachers College |
| U | School of International and Public Affairs |
| V | Interschool Course |
| W | Interfaculty Course |
| Y | Teachers College |
| Z | American Language Program |

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The **first digit** of the course number indicates the level of the course, as follows:

| | |
|----------|--|
| 0 | Course that cannot be credited toward any degree |
| 1 | Undergraduate course |
| 3 | Undergraduate course, advanced |
| 4 | Graduate course open to qualified undergraduates |
| 5 | Graduate course open to qualified undergraduates |
| 6 | Graduate course |
| 7 | Graduate course |
| 8 | Graduate course, advanced |
| 9 | Graduate research course or seminar |

Note: Level Designations Prior to 1961:

1-99 Undergraduate courses
100-299 Lower division graduate courses
300-999 Upper division graduate courses

The term designations are as follows:
X=Autumn Term, **Y**=Spring Term, **S**=Summer Term
Notations at the end of a term provide documentation of the type of separation from the University.

THE ABOVE INFORMATION REFLECTS GRADING SYSTEMS IN USE SINCE SPRING 1982. THE CUMULATIVE INDEX, IF SHOWN, DOES NOT REFLECT COURSES TAKEN BEFORE SPRING OF 1982. ALL TRANSCRIPTS ISSUED FROM THIS OFFICE ARE OFFICIAL DOCUMENTS. TRANSCRIPTS ARE PRINTED ON TAMPER-PROOF PAPER, ELIMINATING THE NEED FOR SIGNATURES AND STAMPS ON THE BACK OF ENVELOPES. FOR CERTIFICATION PURPOSES, A REPRODUCED COPY OF THIS RECORD SHALL NOT BE VALID. THE HEAT-SENSITIVE STRIP, LOCATED ON THE BOTTOM EDGE OF THE FACE OF THE TRANSCRIPT, WILL CHANGE FROM BLUE TO CLEAR WHEN HEAT OR PRESSURE IS APPLIED. A BLUE SIGNATURE ALSO ACCOMPANIES THE UNIVERSITY SEAL ON THE FACE OF THE TRANSCRIPT.

Washington University in St. Louis
SCHOOL OF LAW

August 31, 2022

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

RE: Recommendation for Nanxi You

Dear Judge Walker:

Nanxi You, a student in the Washington University School of Law class of 2024, has asked me to write in support of her application to serve as a law clerk in your chambers after her graduation. I am happy to recommend her to you.

Nanxi was a student in my Civil Procedure class in the spring of 2022. She received the highest score in her class of 90 students, with a grade of A+. In her exam paper, which I have reread for the purpose of writing this letter, she displayed a consistently strong familiarity with the statutes, rules, and doctrines covered in the course. All of her analyses were thoughtful and dispassionate. She got to the heart of each question and discerned a number of nuances that most students overlooked. In addition, her essays were straightforward, well organized, and concise, with a very readable and mature prose style.

I have also had conversations with Nanxi outside of class. She is sophisticated, intellectually curious, and highly engaged with issues of legal doctrine and practice. She looks forward to eventually becoming a litigator, probably specializing in the antitrust area. She has already gotten involved in several projects in the antitrust sphere, and she projects enthusiasm for continuing along that path. In addition, she comes across as friendly and good humored, and I expect you would enjoy working with her.

In short, I believe that Nanxi is highly qualified for a good clerkship, and I hope you will give her serious consideration. Please feel free to be in touch with me if you think I can furnish any other information that might be helpful.

Best,

/s/

Ronald Levin
William R. Orthwein Distinguished Professor of Law

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COLLEGE OF LAW

280 Boyd Law Building
Iowa City, Iowa 52242-1113

October 6, 2022

Re: Recommendation for Nanxi You

Dear Judge:

I am writing to recommend Nanxi You for a clerkship in your chambers. She is a sharp student and an engaged, eager participant in class discussions, and I am confident she would make a terrific addition to your chambers.

I came to know Ms. You while I was teaching as a Visiting Professor at Washington University School of Law in Spring 2022. She was an active voice in my Contracts class, always prepared when cold-called and also volunteering often (but not too often). When she spoke in class, her comments displayed a high level of preparation and engagement with the material. My class that semester had approximately 90 students (and all classes at the school were on Zoom for the first two weeks due to Omicron), so my ability to comment with specificity on the participation of individual students is somewhat less than I would like, but Ms. You nevertheless distinguished herself in class in participation as well as her final grade. I also came to know her during office hours and by email, where she posed questions that indicated that she had given a lot of thought to the material we were studying. In every interaction, she has been thoughtful, hardworking, highly motivated, and courteous.

As a former practicing lawyer and law clerk, I believe Ms. You has a very bright future in practice and would make an outstanding contribution to your chambers. Please do not hesitate to contact me if you would like to discuss her candidacy further.

Sincerely,

/s/
Gregory Shill
Professor of Law
University of Iowa College of Law
gregory-shill@uiowa.edu
(319) 335-9057

Washington University in St. Louis
SCHOOL OF LAW

September 8, 2022

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

RE: Recommendation for Nanxi You

Dear Judge Walker:

I am writing this letter on behalf of Nanxi You as I understand that she has applied for a clerkship with you. I enthusiastically, and without qualification, recommend Nanxi for a clerkship. Nanxi is an outstanding researcher and writer, self-motivated and a delight to work with. Nanxi was one of fifty-three students in my first year required Legal Practice class during the 2021-22 academic year. Nanxi's research skills, written work product, and oral presentation skills were in the top 20% of my class in the fall and in the top 7% in the spring.

Nanxi's grade for the fall semester was based on drafting one major client advisory letter, and one major memorandum, as well as several shorter written assignments. The client advisory letter was "closed," meaning that the students were not required to do any original research and the memorandum was "open," that is, the students were required to do their own original research in order to draft the memorandum. In the spring, Nanxi's written projects included a "closed" trial court brief, an oral argument on that brief, and an "open" research appellate brief.

In addition to the written assignments in Legal Practice, Nanxi had to complete two individual oral research presentations. For the presentations, she had to independently research several issues based on a hypothetical problem, determine the relevant research results that would assist her in making a prediction for the client, and then present those results to me in person in an individual meeting. Nanxi did an excellent job of discerning the relevant issues and finding case law that resolved those issues. She was very poised and confident in her presentations. She did a great job of walking me through her research results, answering my questions and providing a prediction and advice for the clients. Nanxi's score on her individual research presentations improved dramatically from the fall to the spring – a sign that she absorbed the constructive criticism from her first presentation and applied it to her second presentation.

Nanxi took the initiative in her educational endeavors. For example, she took advantage of every opportunity to meet with me to ask questions about her written draft assignments. For her meetings with me, Nanxi made sure her draft was as complete as possible. She came to the meeting with specific questions and suggested answers. She asked insightful questions during her individual meetings that demonstrated she had thought about the material. As another example of her initiative, Nanxi told me that by changing the way she studied for classes, she improved her GPA dramatically from first to second semester. Nanxi has the ability to listen and embrace constructive criticism – a skill that will serve her well as a lawyer.

Because of the small group nature of my class, I had the opportunity to get to know and observe Nanxi on a personal, as well as professional level. She was always supportive of her fellow students in a non-competitive manner. Nanxi listens carefully to what others have to say and if she disagrees, does so in a respectful, thoughtful manner.

At WashULaw, students are asked to submit a clerkship recommendation request form to faculty when requesting a clerkship recommendation. The form requires students to think about why they are applying for a clerkship. Nanxi's clerkship recommendation request is the most detailed request I have seen which indicates to me that she has thought very deeply about why she wants to clerk. In her request, she noted that she believes that "clerking is an opportunity to learn about different areas of the law while thinking through challenging issues and helping judges make decisions that shape common law." She also stated that she believed "clerking would help develop a better sense of what should and should not do in practice." Both of those reasons, as well as others she noted, make sense to me and are the kinds of reasons I would want a potential clerk to identify.

In short, Nanxi is a very highly self-motivated, hard-working student who consistently strives to do her best. She was always open to suggestions and eager to improve her research and writing skills for her own educational reasons, not for a grade.

I was delighted to learn that Nanxi was applying for a clerkship with you. She is truly an outstanding student, exhibits a love of learning and is delightful to work with. Therefore, I enthusiastically and highly recommend that you hire Nanxi You as your law clerk. Please call me if you have any questions regarding this letter or Nanxi's qualifications for a clerkship.

Jo Ellen Lewis - lewisj@wustl.edu - 314-935-4684

Best,

/s/

Jo Ellen Dardick Lewis
Professor of Practice

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WRITING SAMPLE 1

The following writing sample is based on a brief submitted for the Wiley Rutledge Moot Court Competition. My partner and I represented the respondent, the West Canaan Unified School District (the “District”), in a petition for writ of certiorari filed by Maureen Moxon (“Petitioner”), as next friend to her minor child K.M., for the following issues:

- I. Whether the parent of a student who refuses to participate in a prayer led by an on-duty public school employee has standing, as next friend of her child, to assert a violation of the Establishment Clause; and
- II. Whether it is a violation of the Establishment Clause for a public school district to permit an employee to lead a prayer among students participating in a school-sponsored activity.

Bud Kilmer (“Kilmer”) is a coach of the football team at West Canaan High School, a public school (the “School”) within the District’s jurisdiction. Since at least 2002, Kilmer has made it a practice to lead his players in a traditional Christian prayer in the locker room before the start of each football game. K.M., who is agnostic and does not ascribe to any religious belief, joined the School’s football team in 2021.

When K.M. requested that Kilmer stop leading the students in prayer because he was not comfortable reciting it, Kilmer told him that he was not going to stop because the prayer was a longstanding tradition, and it would not be fair to the other players on the team who wanted to join in the prayer if he were to stop leading it. He further told K.M. that it was up to K.M. whether he wanted to join the prayer, but was encouraged to for team unity. K.M. chose to not recite the prayer and to remain seated during the prayer, leading to ridicule by his teammates.

When Petitioner requested the District to prohibit Kilmer from leading the prayer, the District informed her that it would not take action. Petitioner then brought suit under 42 U.S.C. § 1983, claiming that the District’s policy of permitting Kilmer to lead prayer violated the Establishment Clause and requesting that the District and Kilmer be enjoined from leading students in prayer. The District Court for the Eastern District of Texasota entered a judgement for Petitioner. The Court of Appeals for the Twenty-First Circuit reversed, holding that while Petitioner had standing to challenge the District’s practice of permitting its employee to lead students in prayer in connection with a school-sponsored activity, the District’s practice did not violate the Establishment Clause.

For purposes of this writing sample, I have deleted the Table of Authorities, Questions Presented, Jurisdictional Statement, Constitutional Provisions and Statutes, Statement of the Case, and Issue I. The discussion of Issue I has been removed from the Summary of the Argument section. This writing sample is my own work product and has not been substantially edited by any other person.

Nanxi You

No. 22-105

In the Supreme Court of the United States

MAUREEN MOXON, AS NEXT FRIEND OF K.M., A MINOR CHILD, PETITIONER

v.

WEST CANAAN UNIFIED SCHOOL DISTRICT, RESPONDENT

*ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TWENTY-FIRST CIRCUIT*

BRIEF FOR THE RESPONDENT

Team No. 4

October 7, 2022

Nanxi You

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QUESTIONS PRESENTED

[Intentionally Deleted]

PARTIES ON APPEAL

Petitioner Maureen Moxon (“Petitioner”), as next friend to K.M., a minor child, was the plaintiff below and appellee below. Respondent West Canaan Unified School District (the “District”) was the defendant and appellant below.

OPINIONS BELOW

The decisions of the District Court for the Eastern District of Texas (the “District Court”) and the Court of Appeals for the Twenty-First Circuit (the “Circuit Court”) are included in the attached record at 4–8 and 10–15 respectively.

JURISDICTIONAL STATEMENT

[Intentionally Deleted]

CONSTITUTIONAL PROVISIONS AND STATUTES

[Intentionally Deleted]

STATEMENT OF THE CASE

[Intentionally Deleted]

SUMMARY OF THE ARGUMENT

The District did not violate the Establishment Clause by allowing Coach Kilmer (“Kilmer”) to lead pregame prayers. The facts of this case are similar to the ones that were presented in *Kennedy v. Bremerton*, in which this Court did not find an Establishment Clause violation when a coach invited students to join his postgame prayer on the field in public. 142 S. Ct. 2407, 2433 (2022). Here, Kilmer led pregame prayers in the locker room in private. The most important fact that this case shares with *Kennedy* is that the prayer was voluntary, not coercive. Through a

Nanxi You

historical understanding of the purpose of the Establishment Clause, the Establishment Clause is only concerned with government practices that coerce people into adopting religion through threat of penalty. Here, it was entirely up to K.M. whether he wanted to join in the prayer. Even if he felt peer pressure to join in, this pressure is not considered coercion by Establishment Clause standards.

This Court has also analyzed Establishment Clause cases through other tests that focus on whether the challenged government practice had a purpose of advancing religion and whether it would be perceived as endorsing or approving religion. But even through these alternative tests, which this Court has disfavored, the District policy of permitting Kilmer’s prayer was allowed by the Establishment Clause. The Establishment Clause must be interpreted in a way that is tolerant of religious expression, rather than requiring the government to censor anything that relates to religion. This approach better situates the Establishment Clause with the free speech and free exercise rights guaranteed by the First Amendment. Thus, the Establishment Clause is not violated when Kilmer merely extended an *invitation* for students to join his private prayer—an invitation to pray is vastly different from a requirement to pray.

ARGUMENT

I. [INTENTIONALLY DELETED]

II. THE DISTRICT COMPORTED WITH THE REQUIREMENTS OF THE ESTABLISHMENT CLAUSE BY PERMITTING A HIGH SCHOOL COACH TO LEAD STUDENTS IN A PREGAME PRAYER.

The First Amendment forbids the government from any practice that amounts to “an establishment of religion” or any practice “prohibiting the free exercise thereof.” *U.S. Const. amend. I*. As a threshold matter, Kilmer’s pregame prayer does not fall within the scope of the Establishment Clause because it is private speech that is not attributable to the District. But even

Nanxi You

if Kilmer’s prayer constituted government speech, the District’s policy of permitting his prayer did not violate the Establishment Clause under any of the approaches that this Court has adopted in analyzing Establishment Clause cases.

A historical approach to interpreting the Establishment Clause is necessary because it recognizes that there are many religious practices that have historically been allowed under the Establishment Clause. *County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573, 670 (1989) (Brennan, J., dissenting). Under a historical approach, the District can permit Kilmer’s prayer without violating the Establishment Clause. Therefore, this Court should affirm the Circuit Court’s judgement that the District’s policy of permitting Kilmer’s prayer comported with the requirements of the Establishment Clause.

A. The District’s neutral policy of permitting private religious speech comports with the requirements of the Establishment Clause.

The Constitution does not mandate or permit the District to suppress private religious speech. *Kennedy*, 142 S. Ct. at 2433. As this Court has noted, “there is a crucial difference between government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses protect.” *Board of Education of Westside Community Schools v. Mergens*, 496 U.S. 226, 250 (1990). This Court has further consistently held that “it is no violation for government to enact neutral policies that happen to benefit religion.” *Capitol Square Review & Advisory Board v. Pinette*, 515 U.S. 753, 764 (1995).

1. Kilmer’s prayer constitutes private religious speech that is not attributable to the District.

Because Kilmer’s prayer did not fall within the scope of his duties as a coach, it is private speech that is protected by the First Amendment. *See Lane v. Franks*, 573 U.S. 228, 235–42 (2014)

Nanxi You

(when a government employee’s speech is not ordinarily within the scope of his duties, it is private speech that is protected by the First Amendment); *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006) (whether speech is within scope of employee’s duties depends on if the speech was part of what he was employed to do). Even when Kilmer was on duty as a coach, he was free to engage in private speech. *Kennedy*, 142 S. Ct. at 2425. In *Kennedy*, a football coach engaged in prayers on the field after games, to which students on the team asked to join; even though he was still on duty and served as a role model, this Court recognized the coach’s prayers as private speech because he was not trying to convey a government-created message, instructing players, discussing strategy, or engaging in any speech that the school paid him to perform as a coach.

Kilmer’s prayer is similar to the prayer at issue in *Kennedy*. The District did not pay Kilmer to say his prayer—it was not part of his coaching duties. Crucially, this Court recognized in *Kennedy* that the coach shouldn’t be expected to “shed [his] constitutional rights” upon entering school grounds. 142 S. Ct. at 2423 (quoting *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 506 (1969)). This is equally applicable to Kilmer’s right to speech: even if he was on duty before the games and was serving as a role model to the students while in the locker room, Kilmer had a right to his religious expression. If the District censored Kilmer’s prayer, it would violate the Free Speech and Free Exercise Clauses, as this Court held for the prayer at issue in *Kennedy*. Moreover, the fact that Kilmer’s prayer might be perceived as government speech does not actually make his prayer attributable to the District. See *Capitol Square Review*, 515 U.S. at 764–69 (rejecting a “transferred endorsement” principle where private expression violates Establishment Clause because it might be mistaken for officially endorsed religious expression, since policymakers would find themselves “in a vise between the Establishment Clause on one side and the Free Speech and Free Exercise clauses on the other”).

Nanxi You

While this Court has invalidated school prayers on Establishment Clause grounds, it has done so because they were endorsed by the government. *See Sante Fe Independent School District v. Doe*, 530 U.S. 290, 294–99 (2000) (school declared a policy that student elections must take place to select a chaplain to lead invocations at football games, which were delivered in an official setting over the school’s public address system, and forcefully suggested that the invocation was to be a public prayer); *Lee v. Weisman*, 505 U.S. 577, 587–90 (1992) (principal’s decision that prayers should be given and his selection of clergy for an official school graduation ceremony are choices attributable to the state, so government involvement with religious activity was pervasive); *Engel v. Vitale*, 370 U.S. 421 (1962) (a short prayer recommended by the New York Board of Regents for students at the start of each school day was an impermissible establishment of religion). In contrast, as the District stated in its correspondences with the Petitioner, it adopted a completely neutral position such that “while [K.M.] remains free not to participate in the prayer if he does not want to, Coach Kilmer and the other players equally have the right to engage in such a traditional pregame prayer if they wish to.” R. at 5. The District did not institute a policy of mandating prayer, so in no sense was the District pervasively involved in Kilmer’s prayer. Kilmer’s prayer is not attributable to the District because the District did not implicitly or explicitly encourage Kilmer to lead his prayer.

2. In permitting Kilmer’s prayer, the District comported with the Establishment Clause by ensuring neutrality towards religion.

The District’s policy of permitting private religious speech on a nondiscriminatory basis does not violate the Establishment Clause. On the contrary, this Court has noted that the “First Amendment mandates governmental neutrality...between religion and nonreligion.” *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968). *See also Mergens*, 496 U.S. at 248–49 (a state law that

Nanxi You

prohibited schools from denying access to facilities to students who wanted to form clubs on the basis of religious speech at club meetings did not violate the Establishment Clause because the law granted equal access to both non-religious and religious speech); *Capitol Square Review*, 515 U.S. at 770 (permitting a private display of a religious symbol in a public forum did not violate the Establishment Clause because the public forum was open to everyone on equal terms).

In order for the District to comply with the First Amendment, it must be neutral. Neutrality means that it extends equal access to religious and nonreligious viewpoints. If the District censored private religious speech, it would be in danger of violating the Free Exercise and Free Speech Clauses because it would show hostility towards religion. *See Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384, 390–94 (1993) (school district's preclusion of private group from presenting films at the school based on the films' religious views violated the Free Speech Clause). In permitting Kilmer's prayer, the District granted equal access to both private religious and nonreligious speech. On its face, the District's policy is neutral because it neither endorses nor disapproves of religion, similar to the policies at issue in *Mergens* and *Capitol Square Review*; Kilmer and the students were all equally allowed to express their religious or non-religious viewpoints, and no one was forced by the District to adopt any particular viewpoint. Thus, permitting Kilmer's prayer did not mean that the District discriminated in favor of private religious expression. This is the case even if the District's policy happened to incidentally benefit religion. *See Capitol Square Review*, 515 U.S. at 763–65 (a policy that benefits religion does not count as sponsoring the private group's expression).

Nanxi You

B. Even if Kilmer’s prayer constitutes government-sponsored speech, the District’s policy of permitting his prayer comported with the Establishment Clause under all of the approaches that this Court has adopted in analyzing Establishment Clause cases for government-sponsored speech.

This Court has taken three different approaches for Establishment Clause cases for government-sponsored speech. Under this Court’s most recent approach in *Kennedy*, which looked to a historical understanding of the Establishment Clause, the District did not violate the Establishment Clause because it did not coerce K.M. into participating in the prayer. Under the test that this Court adopted in *Lemon v. Kurtzman* (the “*Lemon* test”), the District still did not violate the Establishment Clause because its policy of permitting Kilmer’s prayer did not have the effect of advancing religion, was not perceived as advancing religion, and was not excessively entangled with religion. Under the modified version of the *Lemon* test that this Court adopted in *County of Allegheny* (the “endorsement test”), the District still did not violate the Establishment Clause because it did not endorse any religion. Given that this Court has expressly declined to apply the *Lemon* test or ignored it in the past due to its shortcomings, a historical understanding of the Establishment Clause is necessary. *See American Legion v. American Humanist Ass’n*, 139 S. Ct. 2067, 2080 (2019).

Nanxi You

1. Under the Court's most recent approach in *Kennedy*, the District's policy of permitting Kilmer's prayer comported with the Establishment Clause because it did not coerce students into participating in the prayer.
 - a. The Establishment Clause only prohibits the District from coercing students into participating in Kilmer's prayer.

As this Court instructed in *Kennedy*, the Establishment Clause must be interpreted with reference to historical practices and understandings rather than through the *Lemon* test, which the Court “long ago abandoned.” 142 S. Ct. at 2427. Even before *Kennedy*, this Court stated that its interpretation of the Establishment Clause “has comported with what history reveals was the contemporaneous understanding of its guarantees,” rather than be confined to just the *Lemon* test. *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984).

Through a historical understanding of the Establishment Clause, the District is only prohibited from coercing students into participating in prayer. Historically, the Establishment Clause prohibited coercion “by force of law and threat of penalty.” *Weisman*, 505 U.S. at 640 (Scalia, J., dissenting). Specifically, it prohibited coercive state establishments that “exercised government power in order to exact financial support of the church, compel religious observance, or control religious doctrine.” *Town of Greece v. Galloway*, 572 U.S. 565, 608 (2014). Thus, the Establishment Clause was concerned with the government’s legal coercion, such as limiting political participation to established church members and levying taxes to generate church revenue. *Id.* at 608. Given this historical understanding, the District could only violate the Establishment Clause if it coerced students into participating in the prayer, in a similar manner to how coercive state establishments historically compelled religious observance: under force of law and threat of penalty. This is because, when there is no coercion, “the risk of infringement of religious liberty

Nanxi You

by passive or symbolic accommodation is minimal.” *County of Allegheny*, 492 U.S. at 662 (Brennan, J., dissenting).

b. K.M. was not coerced into participating in Kilmer’s prayer.

K.M. was not coerced into participating in Kilmer’s prayer because it was entirely voluntary. In *Kennedy*, this Court pointed to the fact that not a single student joined the coach’s prayers during the games for which he was disciplined as evidence that he did not coerce them to join him in praying. 142 S. Ct. at 2430. It emphasized that, based on a historical understanding of the Establishment Clause, mere visible religious conduct by the coach is not impermissibly coercive on students. *Id.* at 2431. Similarly, Kilmer did not compel K.M. to join his prayer. Like in *Kennedy*, K.M. was never required to participate because Kilmer told him that it was “up to” K.M. if he wanted to join. R. at 2. K.M. himself evidently did not think that he was required to participate, and was not pressured into participating, since he chose to not say the prayer and to remain seated during the prayer. R. at 2.

Moreover, the District did not coerce K.M. into participating in the prayer by merely exposing him to the prayer, even if he did not want to participate in it. *See Zorach v. Clauston*, 343 U.S. 306, 311–12 (1952) (public school program permitting students to spend time in private religious classrooms off campus was not coercive because they were not required to attend religious classrooms and school did not persuade or force students to participate in religious classrooms); *Town of Greece*, 572 U.S. at 588–90 (town board’s practice of prayers during the ceremonial portion of its meetings was not coercive because lawmakers did not single out dissidents, direct the public to participate, force the public to stay in the room during prayers, or indicate that their policymaking would be influenced by whether or not a person participated in the prayers). Thus, coercion does not occur when students like K.M. are given the option of

Nanxi You

participating in religious activity, which they can always choose to disregard. Moreover, neither offense nor peer pressure from being subjected to Kilmer's prayer constitutes coercion. *See Town of Greece*, 572 U.S. at 589–90 (even if the prayers gave the audience members offense and made them feel excluded and disrespected by exposing them to prayers that they would rather not hear, this offense was not coercion).

Similar to *Town of Greece*, the District did not coerce K.M. into joining Kilmer's prayer because the District did not treat K.M. differently from other students for not praying. Historically, Kilmer's prayer would not have been coercive because K.M. was not punished by "force of law" or "threat of penalty." When Kilmer told K.M. that "it would be best for team unity" if K.M. joined in the prayer (R. at 2), he only suggested that K.M. join in the prayer, and his intention was to foster inclusiveness and team unity, rather than trying to convert non-believers like K.M. Specifically, Kilmer indicated to K.M. that the prayer was a longstanding tradition that he had started at the school over twenty years ago. R. at 1–2.

2. Under the *Lemon* test and the endorsement test, the District's policy of permitting Kilmer's prayer still comported with the Establishment Clause.

In *Lemon v. Kurtzman*, this Court created a three-part test to determine whether a government practice is deemed constitutional under the Establishment Clause: (1) the practice must have a secular purpose, (2) the primary effect of the practice must be one that "neither advances nor inhibits religion," and (3) the practice must avoid "excessive governmental entanglement with religion." 403 U.S. 602, 612–13 (1971). In *County of Allegheny*, this Court adopted the endorsement test, in which a government practice is a violation of the Establishment Clause if it has the effect of endorsing religion; the effects of a government practice depends on whether a reasonable observer would conclude that the government is conveying a message that

Nanxi You

religion is favored or preferred. 492 U.S. at 630–31 (O’Connor, J., concurring). Under either the *Lemon* test or the endorsement test, the District still comported with the Establishment Clause.

a. The District’s policy of permitting Kilmer’s prayer has a secular purpose.

In permitting Kilmer’s prayer, the District was not motivated by the advancement of religion. *Compare Lynch*, 465 U.S. at 680–81 (city’s display of a creche has a legitimate secular purpose because the display was sponsored by the city to celebrate Christmas, which is a tradition that is recognized as a national holiday) *with Wallace v. Jaffree*, 472 U.S. 38, 56–57 (1985) (statute authorizing period of silence for voluntary prayer in public schools was invalid because, as lawmakers expressed, the *only* purpose for the enactment was to return voluntary prayer to schools). Unlike the statute in *Jaffree*, the purpose of the District’s policy was to honor team tradition and foster team unity, which are secular purposes. The District’s policy of not taking action with respect to Kilmer’s prayer also served a broader secular purpose of fostering “mutual respect and tolerance...for religious and non-religious views alike.” *Kennedy*, 142 S. Ct. at 2416.

That the District’s policy may have created incidental benefits to religion, by giving Kilmer a platform to encourage students to join the prayer, does not diminish the secular purpose of the policy. *See Lynch*, 465 U.S. at 680. *See also Board of Education v. Allen*, 392 U.S. 236, 241 (1968) (statute requiring provision of free textbooks to be issued to all students in public and private parochial schools is valid because the purpose of the statute was to further students’ education). Here, a policy of accommodating religious and non-religious views alike was not motivated by religious purpose, even if the policy benefitted Kilmer and religious students.

b. The District’s policy of permitting Kilmer’s prayer did not have the effect of advancing or inhibiting religion, and a reasonable observer would not think that the District was endorsing religion.

Nanxi You

Under the endorsement test, a reasonable observer would not think that the District was endorsing religion because refusal to prohibit Kilmer's prayer is not the same as affirmatively approving his prayer. *Compare Lynch*, 465 U.S. at 683 (city's display of a creche alongside purely secular symbols is no more an advancement or endorsement of religion than legislative recognition of the origins of the Christmas holiday or the "exhibition of literally hundreds of religious paintings in governmentally supported museums") with *County of Allegheny*, 492 U.S. at 598 (city's creche display communicated an unmistakably religious message because it was the only item on display and included a sign that said, "Glory to God in the Highest!").

Here, a reasonable observer would not think that the District's policy is conveying a message that religion is favored or preferred. High school students, regardless of their religious views, would understand that the District's accommodation of the prayer is to ensure that there is a neutral policy – the exact opposite of advancing or inhibiting religion. *See Mergens*, 496 U.S. at 250 (noting that secondary school students are mature enough to understand that schools "do not endorse everything they fail to censor"). Whereas the creche in *County of Allegheny* conveyed an unmistakably religious message, the District did not convey any unmistakably religious message because it never expressed that it preferred religious adherents over non-adherents.

c. The District's policy of permitting Kilmer's prayer did not create excessive governmental entanglement with religion.

The District's policy did not create excessive government entanglement with religion because there was no "intimate and continuing relationship between church and state." *Lemon*, 403 U.S. at 622. *Compare Lynch*, 465 U.S. at 684 (finding no entanglement in city's creche display because city did not contact church authorities about the content of the display prior to or after its purchase of the creche and city's material contribution to the creche was *de minimis*) with *Lemon*,

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403 U.S. at 619–20 (state statutes providing financial support to church-related educational institutions fostered excessive entanglement with religion because they required continuing state surveillance to determine which expenditures were religious and which were secular).

Like in *Lynch*, the District was far removed from religion because it did not provide any material support to Kilmer for leading his prayer, let alone encourage or ask him to lead his prayer. As this Court expressed in *Lynch*, a litigant cannot “create the appearance of [political] divisiveness and then exploit it as evidence of entanglement.” 465 U.S. at 684–85. Here, K.M. has created the appearance that the District’s neutral policy is a pretext for supporting religion, when it is actually directed towards maintaining everyone’s right to religious expression. Thus, this false appearance cannot be used as evidence of entanglement when the District has not provided any support, material or otherwise, to Kilmer for the purpose of leading prayer.

C. The Court should adopt a historical approach to the Establishment Clause, under which the District’s policy of permitting Kilmer’s prayer is so rooted in national tradition that it comports with the Establishment Clause.

1. The District’s policy of permitting prayer is so rooted in national tradition that it comports with the Establishment Clause.

From a historical approach, the practice of voluntary school prayer would have been permitted under the Establishment Clause. In *Marsh v. Chambers*, this Court held that a state legislature’s practice of employing a legislative chaplain to open each legislative session with a voluntary prayer comported with the Establishment Clause because Congress had opened sessions with a prayer for over 200 years, and many state legislatures followed suit. 463 U.S. 783, 786–92 (1983). This historical evidence showed that the drafters of the First Amendment did not intend for the Establishment Clause to apply to legislative prayers, and that the practice of legislative

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prayers is “part of the fabric of our society.” *Id.* at 792. *See also Town of Greece*, 572 U.S. at 576 (“That the First Congress provided for the appointment of chaplains only days after approving language for the First Amendment demonstrates that the Framers considered legislative prayer a benign acknowledgment of religion’s role in society”).

Voluntary school prayers such as the one that Kilmer led has similar historical roots as legislative prayers. As the District noted, “[pregame] prayers are commonly said in locker rooms all across the country and have been for generations.” R. at 5. *See also Weisman*, 505 U.S. at 631–32 (Scalia, J., dissenting) (noting that prayer at graduation ceremonies is a longstanding American tradition). Prayers, regardless of whether they are school or legislative, are a part of the fabric of our society because they have existed for so long. Just as the Framers saw legislative prayers as a “benign acknowledgement” of the role of religion in society, they also would have seen Kilmer’s prayer as an acknowledgement of the role of religion in creating team unity for high school football teams. This kind of acknowledgement does not amount to establishment or endorsement of religion, because as this Court noted in *Marsh*, prayers “presents no more potential for establishment than the provision of school transportation...or tax exemptions for religious organizations.” 463 U.S. at 791.

2. A historical approach to interpreting the Establishment Clause is better suited than the *Lemon* test and endorsement test in delineating the boundaries of the Establishment Clause.

A historical approach recognizes that tolerance for voluntary school prayers promotes the right to religious expression. *See Kennedy*, 142 S. Ct. at 2416. When this Court has used a historical approach in interpreting the Establishment Clause, it has emphasized that the government has an interest in cultivating respect for others’ religious expressions. *See American Legion*, 139 S. Ct. at

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2084–85 (“A government that roams the land, tearing down monuments with religious symbolism and scrubbing away any reference to the divine will strike many as aggressively hostile to religion”). *See also Weisman*, 505 U.S. at 638 (Scalia, J., dissenting) (arguing that a non-adherent’s interest in avoiding the false appearance of participating in a school prayer does not trump the government’s interest in fostering respect for religion generally).

A historical approach recognizes that the District should not be required to insulate students from all things that have even the slightest religious significance. *See Town of Greece*, 572 U.S. at 591 (the purpose of a prayer during the ceremonial portion of the meeting is to merely acknowledge the “central place” that religion holds in people’s lives rather than to coerce nonbelievers). Likewise, voluntary school prayers, especially pregame prayers like the one Kilmer led, serve a ceremonial purpose. Pregame prayers serve as an acknowledgement of the role of religion for team unity and tradition. School prayers are a part of heritage, no different from “the Pledge of Allegiance, inaugural prayer, or the recitation of ‘God save the United States and this honorable Court’ at the opening of this Court’s sessions.” *Town of Greece*, 572 U.S. at 587.

CONCLUSION

The District respectfully requests that this Court dismiss Petitioner’s claim for lack of standing or affirm the Circuit Court’s decision on the Establishment Clause claim.

Dated: October 7, 2022

Respectfully Submitted,

/s/Team No. 4

Team No. 4

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WRITING SAMPLE 2

The following writing sample is based on a case comment submitted for the Write-On Competition at Washington University School of Law in May 2022. I was provided with a packet of “closed universe” materials to analyze the Ninth Circuit’s approach to the issue of whether patients and health insurance companies who brought a civil action under the Racketeer Influenced and Corrupt Organizations Act (RICO) against pharmaceutical companies adequately established the required element of proximate cause. The Ninth Circuit’s holding in *Painters & Allied Trades District Council 82 Health Care Fund v. Takeda Pharmaceuticals Co.* contributed to a circuit split over the central question of whether the decisions of prescribing physicians were intervening causes that severed the chain of causation between the pharmaceutical companies’ allegedly fraudulent conduct and the harm to patients and health insurance companies.

For purposes of this writing sample, I have condensed my discussion of the development of the law leading up to the case under review.

The citations follow Bluebook rules. This writing sample is my own work product and has not been edited by any other person. Based on my performance in the Write-On Competition, the *Washington University Law Review* offered me a position as a Staff Editor.

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THE INTERPRETATION OF PROXIMATE CAUSATION UNDER CIVIL RICO:

Painters & Allied Trades District Council 82 Health Care Fund v. Takeda Pharmaceuticals Co.,
943 F.3d 1243 (9th Cir. 2019)

The Racketeer Influenced and Corrupt Organizations Act (RICO) allows private parties to bring civil suits for treble damages.¹ To recover for a civil RICO violation under 18 U.S.C. § 1962, a plaintiff must prove that the defendant, through the commission of two or more acts constituting a pattern of racketeering activity, directly or indirectly invested in, or maintained an interest in, or participated in an enterprise whose activities affect interstate or foreign commerce.² To have standing under 18 U.S.C. § 1964(c), a plaintiff must show that he was injured “in his business or property by reason of a violation of section 1962.”³ While it has been established that the language “by reason of” requires a plaintiff to prove proximate cause, courts have disagreed on how such a proximate cause test should be applied.⁴ In *Painters & Allied Trades District Council 82 Health Care Fund v. Takeda Pharmaceuticals Co.*,⁵ the Ninth Circuit concluded that pharmaceutical companies’ allegedly fraudulent misrepresentation of a drug’s known safety risk proximately caused RICO harm to patients and health insurance companies.

Five patients and a third-party payor (TPP) of health benefits to covered members filed a class action suit against Takeda Pharmaceuticals USA, Inc., its parent company Takeda Pharmaceutical Company Ltd., and Eli Lilly & Co.⁶ The plaintiffs alleged that the defendants conspired to commit mail and wire fraud by intentionally misleading physicians, consumers, and TPPs to believe that a diabetes drug that the defendants developed and marketed did not increase a consumer’s risk of developing bladder cancer.⁷ The plaintiffs sought to recover economic damages under RICO for the payments they made to purchase the drug, Actos, which they claimed they would not have purchased had they known that it increased their risk of developing bladder cancer.⁸ The District Court for the Central District of California dismissed the RICO claims, reasoning that the plaintiffs failed to sufficiently establish that the defendants’ acts were the

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proximate cause of their damages.⁹ On appeal, the Ninth Circuit reversed and held that the plaintiffs adequately established RICO proximate cause: while the prescribing physicians and pharmacy benefit managers were intermediaries between the defendants' fraudulent conduct and the plaintiffs' payments for the drug, they did not constitute intervening causes that broke the chain of causation.¹⁰

The Supreme Court first interpreted § 1964(c) to require a proximate cause element in *Holmes v. Securities Investor Protection Corp.*¹¹ To establish proximate cause, the Court required a direct relation between the injury asserted and the injurious conduct alleged.¹² It provided three reasons why a direct relation was necessary to establish proximate cause. First, the less direct an injury is, the more difficult it is to ascertain the amount of a plaintiff's damages attributable to the violation as opposed to other independent factors.¹³ Second, allowing recovery for indirectly injured parties would force courts to adopt complicated rules to apportion damages among plaintiffs, or else run the risk of multiple recoveries.¹⁴ Third, the goal of deterring injurious conduct is furthered by counting on directly injured victims to bring their claims without the same issues facing remotely injured parties.¹⁵

However, the Court did not completely bar recovery for victims of third-party fraud. In *Bridge v. Phoenix Bond & Indemnity Co.*,¹⁶ the defendants were bidders at a tax lien auction who allegedly violated a county rule that prohibited bidders from using agents to submit simultaneous bids and furnished fraudulent compliance affidavits.¹⁷ The Court held that plaintiffs, who were other bidders in the tax sales, could adequately establish proximate cause even though the misrepresentations were made to the county.¹⁸ Notably, it argued that it was a "foreseeable and natural consequence of [defendants'] scheme...that other bidders would obtain fewer liens" and

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distinguished the case from *Holmes* in that there were no independent factors that accounted for the plaintiffs' injury.¹⁹

Lower courts have diverged in their interpretation of the proximate cause requirement for RICO claims pertaining to prescription drugs fraud. In *Sidney Hillman Health Center of Rochester v. Abbott Laboratories*,²⁰ TPPs that paid for beneficiaries' off-label use of seizure drugs brought a RICO claim against a drug manufacturer for its unlawful sales tactics, arguing that they were directly injured because they paid for most of the cost of the drugs.²¹ However, the Seventh Circuit held that misrepresentations made to physicians don't support a RICO claim by the TPPs who were "several levels removed in the causation sequence" and not the initially injured parties.²² In *UFCW Local 1776 v. Eli Lilly & Co.*,²³ the Second Circuit took the same approach as the Seventh Circuit. The TPPs alleged that the drug manufacturer's misrepresentation about the drug's efficacy and side effects resulted in higher price and greater demand for the drug, resulting in TPPs (1) paying for prescriptions that would not have been written but for the misrepresentation and (2) paying a higher price for the drug than they would have been charged absent the misrepresentation.²⁴ The court held that proximate cause could not be established for either theories of harm because of the independent actions of prescribing physicians, who may have relied on the misrepresentation to different degrees.²⁵

In contrast, the First Circuit found proximate causation under similar facts in *In re Neurontin Marketing & Sales Practices Litigation*.²⁶ TPPs claimed that the drug manufacturers engaged in fraudulent marketing to doctors and TPPs, which influenced both formulary decisions and prescribing decisions, and misrepresented the drug's effectiveness for off-label uses.²⁷ The court found that TPPs satisfied the direct relationship test in *Holmes*, and that the causal chain was "anything but attenuated" because the drug manufacturers had always known that, "because of the

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structure of the American health care system, physicians would not be the ones paying for the drugs they prescribed.”²⁸ Notably, the court reasoned that the fact that some physicians may have based their prescribing decisions in part on factors other than the fraudulent marketing does not make the causal chain attenuated; this argument is only relevant to determining damages, but does not affect the question of proximate cause.²⁹ Similarly, in *In re Avandia Marketing, Sales Practices & Product Liability Litigation*,³⁰ the Third Circuit held that the conduct that allegedly caused the TPPs’ injuries was the same conduct underlying the RICO scheme—the misrepresentation of risks associated with taking the drug—that caused TPPs to place the drug in the formulary. It further concluded that prescribing physicians did not suffer RICO injury from the fraudulent marketing, so the TPPs’ economic injury was independent of any third parties who were injured.³¹

In *Painters*, the Ninth Circuit decided to take the same approach as the First and Third Circuits on the issue of proximate cause.³² First, it found that the TPP’s and patients’ allegations satisfied the direct relation requirement stated in *Holmes*, as they were the immediate victims of the drug manufacturer’s fraudulent scheme to conceal the risk of bladder cancer.³³ The court also found that the three *Holmes* factors weighed in favor of establishing proximate cause, as (1) it did not think that the calculation of damages would be so difficult that the plaintiffs should be denied the opportunity to prove their damages, (2) there was no concern of multiple recoveries because patients sought to recover only the amount they paid out-of-pocket, and (3) holding the defendants liable for the plaintiffs’ alleged injuries would deter harmful conduct because they were the most direct victims suffering economic injury.³⁴

Next, the Ninth Circuit analyzed the central issue between the Second and Seventh Circuits and the First and Third Circuits: “whether the decisions of prescribing physicians and pharmacy benefit managers constitute intervening causes that sever the chain of proximate cause between

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the drug manufacturer and TPP.”³⁵ It concluded that the First and Third Circuits’ approach was more consistent with the Supreme Court’s direct relation requirement, reasoning that prescribing physicians were not intervening causes because “it was perfectly foreseeable that physicians who prescribed [the drug] would play a causative role” in the defendants’ allegedly fraudulent scheme.³⁶

The Ninth Circuit correctly interpreted the direct relation requirement in holding that proximate cause was sufficiently established. In *Holmes*, the Supreme Court used the direct relation requirement to avoid the difficulties of distinguishing the amount of a plaintiff’s damages attributable to the RICO violation from other independent factors.³⁷ Thus, the Court was concerned about the possibility of independent factors, such as the prescribing physicians and pharmacy benefit managers in *Painters*. But in *Painters*, as the Ninth Circuit noted, it is not so clear that the prescribing physicians are independent factors.³⁸ The Ninth Circuit correctly drew an analogy to *Bridge*, where proximate cause was established because the harm to the other bidders was a foreseeable consequence of the defendants’ fraudulent scheme.³⁹ In the context of TPPs, foreseeability is important because it establishes that the defendants *intended* to cause economic injury to TPPs through their misrepresentation. Because Actos was a prescription drug, the defendants knew that the only way their alleged fraud could be carried out was through the actions of prescribing physicians.⁴⁰ The physicians were merely intermediaries that were necessary for the fraudulent scheme to work—they were not intended as the target of the alleged RICO violation because TPPs and patients were the parties that would inevitably suffer economic injury. The plaintiffs provided sufficient evidence that physicians lacked knowledge about the risk of the drug, and it was not the case that physicians deliberately prescribed the drug after learning about its risks.⁴¹

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But even if prescribing physicians and pharmacy benefit managers are independent factors, they are not *substantial* factors that should break the causal chain.⁴² In both *Holmes* and *Bridge*, the Court noted that proximate cause is a “flexible concept”⁴³ for which it is “virtually impossible to announce a black-letter rule that will dictate the result in every case.”⁴⁴ The direct relation test is based on the assumption that the less direct an injury is, the more difficult it is to tell how much of a plaintiff’s injury can be attributed to the RICO violation. But, in the context of pharmaceutical fraud, the direct relation test should not bar recovery when it is possible to tell how much of the economic injury to the patients and TPP stem from the drug manufacturers’ fraudulent scheme. As the First Circuit noted in *Neurontin*, it is possible to use economic analysis and reasonable assumptions about alternative drugs that physicians would have prescribed absent the fraudulent misrepresentation.⁴⁵

The *Holmes* Court may have wanted to bar recovery for harms that were too speculative and that could be due to any number of factors, but the nature and severity of the defendants’ misrepresentation in *Painters* allowed for a reasonable assumption that physicians would have prescribed an alternative drug but for the alleged RICO violation, so the plaintiffs’ economic injury was not speculative.⁴⁶ As the Ninth Circuit noted, there is an important difference between the fraudulent promotion of off-label uses in *Sidney Hillman* and *UFCW Local 1776* and the fraudulent failure to warn of a drug’s known risk of causing bladder cancer in *Painters*: whereas it would be difficult to attribute which physicians’ prescribing decisions were influenced by drug manufacturers’ fraudulent promotion of off-label uses, it is more likely that knowing about a drug’s risk of causing bladder cancer would materially influence physicians’ prescribing decisions.⁴⁷ The Ninth Circuit correctly took a functional approach in its analysis of the *Holmes* factors, particularly in its recognition that calculation of damages was possible. A functional approach that does not

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read too much into the literal requirement of a direct relation between the injury and the RICO violation is better for achieving the intended purpose of a proximate cause requirement.⁴⁸

Rather than focusing on the difficulty of calculating damages as the Second and Seventh Circuits did,⁴⁹ the Ninth Circuit correctly focused on the purpose of the proximate cause requirement, noting that drug manufacturers should not be “insulated from liability” for their fraudulent conduct by hiding behind prescribing doctors.⁵⁰ Proximate cause is ultimately a policy question on how far to extend liability. The Second and Seventh Circuits’ denial of standing to TPPs will have negative policy implications because it severely weakens the reach of the RICO statute, which is an important deterrent against drug manufacturers that engage in fraudulent marketing schemes.⁵¹ By making it harder for TPPs to sue for pharmaceutical fraud, drug manufacturers will continue to engage in fraudulent marketing that harm multiple parties. The Ninth Circuit’s interpretation of RICO’s proximate cause requirement, on the other hand, recognizes a broader approach to the Supreme Court’s direct causation test in which the foreseeability of harm can still be considered in imposing liability.⁵² In opting for a broader interpretation, the Ninth Circuit has stayed true to the purpose of the RICO statute,⁵³ and has demonstrated how civil RICO can be used as a powerful tool against pharmaceutical fraud.⁵⁴

¹ 18 U.S.C. §§ 1961–1968.

² The statute lists approximately 150 predicate offenses deemed to be “racketeering activity” in 18 U.S.C. § 1961(1). Of particular relevance to this Case Comment are the predicate offenses of mail and wire fraud under 18 U.S.C. §§ 1341, 1343.

³ See CHARLES DOYLE, CONG. RSCH. SERV., RL96-950, RICO: A BRIEF SKETCH 19–25 (2021) (explaining the elements of the civil RICO statute).

⁴ See *infra* notes 15, 20 and accompanying text.

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⁵ 943 F.3d 1243 (9th Cir. 2019).

⁶ *Id.* at 1246. The TPP, Painters and Allied Trades District Council 82 Health Care Fund, relies on its members to submit claims for drugs and expects that patients and prescribing physicians will make “informed decisions” about which drugs will be prescribed and submitted for reimbursement. *Id.* at 1247; *see also In re Avandia Mktg., Sales Pracs. & Prod. Liab. Litig.*, 804 F.3d 633, 634–35 (3d Cir. 2015) (explaining how pharmacy benefit managers prepare TPPs’ formularies of drugs approved for use by TPPs’ members).

⁷ The plaintiffs argued that despite learning of the increased risk of developing bladder cancer, the defendants refused to change the warning label on the drug or inform them of the risk. *Painters*, 943 F.3d at 1246.

⁸ Patients claimed neither they nor their physicians knew about Actos’s risk of bladder cancer when they began taking the drug and that they would never have submitted reimbursement claims for Actos to TPPs since they would never had purchased Actos. *Id.* at 1247.

⁹ *Id.* at 1247–48.

¹⁰ *Id.* at 1257.

¹¹ 503 U.S. 258 (1992).

¹² *Id.* at 266–68.

¹³ *Id.* at 269–70.

¹⁴ *Id.*

¹⁵ *Id.* The Court was concerned that a liberal construction of RICO, in which indirectly injured parties could recover, would open the door to “massive and complex damages litigation” that would burden the courts and undermine the effectiveness of treble-damages suits (quoting

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Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters, 459 U.S. 519, 545 (1983)).

¹⁶ 553 U.S. 639 (2008).

¹⁷ *Id.* at 643–44 (2008).

¹⁸ *Id.* at 648.

¹⁹ *Id.* at 658.

²⁰ 873 F.3d 574 (7th Cir. 2017).

²¹ *Id.* at 576.

²² *Id.* at 578. The court noted several difficulties with calculating damages if the TPPs were to be given RICO standing: (1) not all off-label prescriptions were injurious to TPPs because they may have been beneficial to patients and cheaper than an alternative drug, (2) even in the absence of the drug manufacturer’s misrepresentations, physicians may have written the same prescriptions anyways, and (3) physicians’ prescribing practices may have been influenced by factors other than the drug manufacturer’s misrepresentations. It rejected the TPPs’ argument that the effects of the drug manufacturer’s misrepresentations could be estimated using a regression analysis, suggesting that any estimate would be speculative. *Id.* at 577. *But see In re Neurontin Mktg. & Sales Pracs. Litig.*, 712 F.3d 21 (1st Cir. 2013) (using economic analysis to find a causal connection between fraudulent marketing and quantity of prescriptions written for off-label indications).

²³ 620 F.3d 121 (2d Cir. 2010).

²⁴ *Id.* at 131.

²⁵ *Id.* at 136.

²⁶ 712 F.3d 21 (1st Cir. 2013).

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²⁷ *Id.* at 28.

²⁸ *Id.* at 38.

²⁹ *Id.* at 39. One expert calculated the percentage of prescriptions caused by the fraudulent marketing: three out of ten prescriptions written by neurologists for migraine would not have been written but for the alleged misrepresentation. *Id.* at 30. Another expert calculated the damages number using a list of alternative drugs that were more appropriate for each off-label indication; the court accepted this method of damage calculation. *Id.* at 32.

³⁰ 804 F.3d 633, 644 (3d Cir. 2015).

³¹ *Id.* Like the *Neurontin* court, the *Avandia* court noted that distinguishing the amount of damages attributable to the defendant's violation from other independent factors is a question of damages, not of proximate cause. *Id.*

³² *Painters & Allied Trades Dist. Council 82 Health Care Fund v. Takeda Pharms. Co.*, 943 F.3d 1243, 1257 (9th Cir. 2019).

³³ *Id.* at 1251.

³⁴ *Id.* In considering the difficulty of ascertaining damages, the court briefly noted that the plaintiffs had alleged there were at least three less expensive alternatives to Actos but that "[i]n any event, this is a damages question for another day." *Id.* at 1251 n.7.

³⁵ *Id.* at 1257.

³⁶ *Id.*

³⁷ *Holmes v. Secs. Inv. Prot. Corp.*, 503 U.S. 258, 269 (1992).

³⁸ *Painters & Allied Trades Dist. Council 82 Health Care Fund v. Takeda Pharms. Co.*, 943 F.3d 1243, 1257 (9th Cir. 2019).

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³⁹ *Id.* at 1251. *But see* Hemi Grp., LLC v. City of New York, 559 U.S. 1, 12 (2010) (“Our precedents make clear that in the RICO context, the focus is on the directness of the relationship between the conduct and the harm... *Holmes* never even mentions the concept of foreseeability”); Randy D. Gordon, *RICO Had a Birthday! A Fifty-Year Retrospective of Questions Answered and Open*, 105 MARQ. L. REV. 131, 162 (2021) (noting that in *Hemi*, the foreseeability of the harm “proved insignificant”).

⁴⁰ *Painters*, 943 F.3d at 1257; *see also* Simani M. Price et al., *What Influences Healthcare Providers’ Prescribing Decisions? Results From a National Survey*, 17 RSCH. IN SOC. & ADMIN. PHARMACY 1770, 1770 (2021) (finding that contact with pharmaceutical industry was significantly associated with increased industry influence on providers’ prescription decisions).

⁴¹ *Compare Painters*, 943 F.3d at 1258 (survey showed that seventy-five percent of surveyed physicians’ interest in another anti-diabetic drug declined greatly once they learned it carried a risk of bladder cancer), *and* Price et al., *supra* note 40, at 1777 (research indicates that physicians may genuinely lack understanding of what is promotion information and may not be able to distinguish promotional information and scientific evidence), *with* Sidney Hillman Health Ctr. of Rochester v. Abbott Lab’ys, 873 F.3d 574, 577 (7th Cir. 2017) (noting that some physicians were apt to write prescription whether or not the drug manufacturer promoted the drug for off-label uses).

⁴² *See* Gordon, *supra* note 39, at 162 n.155 (“[T]he focus is on...whether the connection [between the conduct and the harm] is attenuated by substantial intervening factors or third party conduct.” (quoting *Doe v. Trump Corp.*, 385 F. Supp. 3d 265, 276 (S.D.N.Y. 2019))).

⁴³ *Bridge v. Phoenix Bond & Indem. Co.*, 553 U.S. 639, 654 (2008).

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⁴⁴ *Holmes v. Secs. Inv. Prot. Corp.*, 503 U.S. 258, 272 n.20 (1992) (quoting *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 536 (1983)); *see also* Stephen Scallan, *Proximate Cause Under RICO*, 20 S. ILL. U. L.J. 455, 467 (1996) (arguing that the Court’s directness test gives a broad reading to the phrase “direct injury”). *But see* Pamela Bucy Pierson, *RICO Trends: From Gangsters to Class Actions*, 65 S.C. L. REV. 213, 246 (2013) (arguing that *Holmes* created a “high and exacting burden” for plaintiffs to prove that their alleged injuries are directly caused by the alleged violation of RICO and that no other factors other than the RICO conduct contributed to their injury).

⁴⁵ *See supra* note 29. *But see* *UFCW Local 1776 v. Eli Lilly & Co.*, 620 F.3d 121, 135 (2d Cir. 2010) (noting the difficulty of attributing injury to the drug manufacturer’s RICO conduct because of uncertainty about what the alternative prescriptions would have been and how they would have been distributed among the plaintiffs); Tracy Weber et al., *Medicare Drug Program Fails to Monitor Prescribers, Putting Seniors and Disabled at Risk*, PROPUBLICA (May 11, 2013, 4:06 PM), <https://www.propublica.org/article/part-d-prescriber-checkup-mainbar> (showing that some physicians still choose to prescribe a drug even after knowing about risks of harmful side effects).

⁴⁶ *See In re Neurontin Mktg. & Sales Pracs. Litig.*, 712 F.3d 21, 49 (1st Cir. 2013) (noting that, even if assumptions of whether doctors would have prescribed lower-cost alternative drugs are speculative, “the burden of proof as to damages is lower than that for causation, and the factfinder is afforded a greater deal of freedom to estimate damages where the defendant, as here, has created the risk of uncertainty”).

⁴⁷ *Painters & Allied Trades Dist. Council 82 Health Care Fund v. Takeda Pharms. Co.*, 943 F.3d 1243, 1258 (9th Cir. 2019). Plaintiffs alleged that sales of Actos decreased approximately eighty

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percent when the Food and Drug Administration issued an official warning on the risk of bladder cancer. *Id.*

⁴⁸ See Scallan, *supra* note 44, at 457, 460 (discussing the limitations of the direct relation test and arguing that, instead of using a foreseeability test, courts have “effectively denied litigants standing by using archaic proximate cause tests”).

⁴⁹ See *supra* note 22.

⁵⁰ *Painters*, 943 F.3d at 1257.

⁵¹ See Scallan, *supra* note 44, at 505 (arguing that “RICO damages...are set at too low a level to overdeter”).

⁵² *Painters*, 943 F.3d at 1257.

⁵³ See S. REP. NO. 91-617, at 79 (1969) (noting that civil RICO is “necessary to free the channels of commerce from all illicit activity”).

⁵⁴ See Pierson, *supra* note 44, at 215, 257 (arguing that civil RICO is “an untapped resource” and that “the way is bright if insurers, either as a single plaintiff or in class actions, want to use RICO to sue pharmaceutical companies for fraudulent misrepresentations about covered drugs”).

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 Journal(s) **Temple Law Review**
 Moot Court Experience **No**

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The Honorable Jamar Walker
United States District Court for the Eastern District of Virginia
Walter E. Hoffman United States Courthouse
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Norfolk, VA 23510

June 11, 2023

Dear Judge Walker,

I write to express my strong interest in a clerkship with your chambers. I graduate from Temple University Beasley School of Law in May 2024, and would be available to clerk for the 2024-2025 term.

Having conducted legal research and analysis in both the public and private sectors, I am confident I would excel as your law clerk. At Temple, I received the top grade and “Best Paper” award in Legal Research and Writing II, and will intern with the Third Circuit Court of Appeals next year as part of Temple’s Federal Judicial Clerkship Clinical Honors Program. I am particularly interested in applying my legal skills to a wide range of contexts, as demonstrated by my academic research as a Law & Public Policy Scholar and my work as an Articles Editor for Temple Law Review.

I have attached for your reference my resume, an unofficial transcript, and a writing sample. Letters of recommendation will be sent separately. I would welcome the opportunity to meet in person or remotely and further discuss the position. Thank you for your time and consideration.

Respectfully,



Asher Young

Asher Young

2121 Market St., Apt. 314, Philadelphia, PA 19103 • (413) 687-5751 • asher.young@temple.edu

EDUCATION

TEMPLE UNIVERSITY BEASLEY SCHOOL OF LAW Philadelphia, PA
J.D. Candidate | GPA: 3.82 (Top 5%) May 2024

Honors: Temple Law Review, Vol. 96 Articles Editor
2023-2024 Federal Judicial Clerkship Honors Program
2022-2023 Arthur H. Gold Scholarship for Outstanding Academic Performance
2022 Law & Public Policy Scholar
Distinguished Performance in Civil Procedure I and Constitutional Law
Best Paper in Legal Research and Writing II

Presentations: The Intersection of Law & Policy at Temple Law: 2023 Annual Update

Activities: American Constitution Society; Student Public Interest Network

WESLEYAN UNIVERSITY Middletown, CT
B.A. in Government and Spanish May 2017

Honors: NESCAC Spring All-Academic Team, 2015-2017; Dean's List

Activities: Men's Varsity Baseball Team, Captain; Wesleyan Argus, Staff Writer

WORK EXPERIENCE

FAEGRE DRINKER BIDDLE & REATH LLP Philadelphia, PA
Summer Associate May 2023 – July 2023

Research legal issues in commercial litigation cases and pro bono matters. Observe and prepare for hearings, conferences, and depositions.

TEMPLE UNIVERSITY BEASLEY SCHOOL OF LAW Philadelphia, PA
Research Assistant for Professor Craig Green August 2022 – December 2022

Research and edit articles on territory and statehood, and affirmative action in legal education.

ADMINISTRATIVE CONFERENCE OF THE UNITED STATES Washington, D.C.
Legal Intern May 2022 – August 2022

Track and analyze potential impacts of legislative proposals on federal agency operations and regulatory programs. Research administrative law issues to improve the fairness and efficiency of federal agency procedures for managing grants and benefits.

BENNETT MIDLAND LLC New York, NY
Senior Associate and Associate (promoted in June 2019) June 2017 – June 2021

Support nonprofits, government agencies, and philanthropies as a management consultant, with a focus on policy analysis, program design, strategic planning, and performance measurement. Coordinate the implementation of Raise the Age legislation and statewide bail reforms in New York City. Deliver technical assistance to elected municipal officials advancing racial and economic equity projects across the American South.

SKILLS AND INTERESTS

Proficient in Spanish. Interested in baseball analytics, urban design, and public history.

Asher Young

Student Academic Transcript

Academic Transcript

Transcript Level

Law

Transcript Type

Advising Transcript

Student Information

Institution Credit

Transcript Totals

Course(s) in Progress

This is not an official transcript. Courses which are in progress may also be included on this transcript.

Student Information

Name

Asher F. Young

Student Type

Continuing Degree
Seeking

Curriculum Information

Current Program : **Juris Doctor**

Program

Law--Full Time

College

Law, Beasley School

Campus

Main

Major and
DepartmentLaw--Full Time, Law:
Beasley School of
Law

Institution Credit

Term : 2021 Fall

College

Law, Beasley School

Major

Law--Full Time

Student Type

First Time
Professional

Academic Standing

Not Calculated

Additional Standing

Dean's List

Term Comments

Semester Notations:

DCP (Civil Procedure I)

| Subject | Course | Campus | Level | Title | Grade | Credit Hours | Quality Points | R | CEU Contact Hours |
|---------|--------|--------|-------|---|-------|--------------|----------------|---|-------------------|
| JUDO | 0402 | Main | LW | Civil Procedure I Ramji-Nogales, J | A | 4.000 | 16.00 | | |
| JUDO | 0406 | Main | LW | Contracts Lipson, J | A+ | 4.000 | 16.00 | | |
| JUDO | 0414 | Main | LW | Legal Research & Writing Kaplan, R | B+ | 3.000 | 9.99 | | |
| JUDO | 0420 | Main | LW | Torts Culhane, J | A | 4.000 | 16.00 | | |
| JUDO | 0437 | Main | LW | Intro to Transactional Skills Monroe, A | S | 1.000 | 0.00 | | |

| Term Totals | Attempt Hours | Passed Hours | CEU Hours | GPA Hours | Quality Points | GPA |
|--------------|---------------|--------------|-----------|-----------|----------------|------|
| Current Term | 16.000 | 16.000 | 16.000 | 15.000 | 57.99 | 3.87 |
| Cumulative | 16.000 | 16.000 | 16.000 | 15.000 | 57.99 | 3.87 |

Term : 2022 Spring

College

Law, Beasley School

Major

Law--Full Time

Student Type

Continuing Degree Seeking

Additional Standing

Dean's List

Term Comments

Semester Notations:

Tie-BP (Legal Research & Writing II)

DCP (Constitutional Law)

| Subject | Course | Campus | Level | Title | Grade | Credit Hours | Quality Points | R | CEU Contact Hours |
|---------|--------|--------|-------|------------------------------------|-------|--------------|----------------|---|-------------------|
| JUDO | 0404 | Main | LW | Constitutional Law Green, R | A | 4.000 | 16.00 | | |
| JUDO | 0410 | Main | LW | Criminal Law I Deguzman, M | A | 3.000 | 12.00 | | |
| JUDO | 0414 | Main | LW | Legal Research & Writing Kaplan, R | A | 2.000 | 8.00 | | |
| JUDO | 0418 | Main | LW | Property Baron, J | B+ | 4.000 | 13.32 | | |
| JUDO | 0600 | Main | LW | Taxation Abreu, A | A | 3.000 | 12.00 | | |

| Term Totals | Attempt Hours | Passed Hours | CEU Hours | GPA Hours | Quality Points | GPA |
|--------------|---------------|--------------|-----------|-----------|----------------|------|
| Current Term | 16.000 | 16.000 | 16.000 | 16.000 | 61.32 | 3.83 |
| Cumulative | 32.000 | 32.000 | 32.000 | 31.000 | 119.31 | 3.85 |

Term : 2022 Summer I

College

Law, Beasley School

Major

Law

Student Type

Continuing Degree Seeking

| Subject | Course | Campus | Level | Title | Grade | Credit Hours | Quality Points | R | CEU Contact Hours |
|---------|--------|--------|-------|---------------------------------|-------|--------------|----------------|---|-------------------|
| JUDO | W510 | Main | LW | Institutional Decision Making | B+ | 3.000 | 9.99 | | |
| JUDO | W910 | Main | LW | Law and Public Policy Knauer, N | A | 3.000 | 12.00 | | |

| Term Totals | Attempt Hours | Passed Hours | CEU Hours | GPA Hours | Quality Points | GPA |
|--------------|---------------|--------------|-----------|-----------|----------------|------|
| Current Term | 6.000 | 6.000 | 6.000 | 6.000 | 21.99 | 3.67 |
| Cumulative | 38.000 | 38.000 | 38.000 | 37.000 | 141.30 | 3.82 |

Term : 2022 Fall

College

Law, Beasley School

Major

Law--Full Time

Student Type

Continuing Degree Seeking

Additional Standing

Dean's List

| Subject | Course | Campus | Level | Title | Grade | Credit Hours | Quality Points | R | CEU Contact Hours |
|---------|--------|--------|-------|--|-------|--------------|----------------|---|-------------------|
| JUDO | 0540 | Main | LW | Evidence Ouziel, L | B+ | 3.000 | 9.99 | | |
| JUDO | 0902 | Main | LW | Guided Research Serial - Legal History Workshop Green, R | A+ | 3.000 | 12.00 | | |
| JUDO | 0905 | Main | LW | Temple Law Review Reinstein, R | CR | 3.000 | 0.00 | | |
| JUDO | 1025 | Main | LW | Law and Public Policy II | A | 3.000 | 12.00 | | |

| Term Totals | Attempt Hours | Passed Hours | CEU Hours | GPA Hours | Quality Points | GPA |
|--------------|---------------|--------------|-----------|-----------|----------------|------|
| Current Term | 12.000 | 12.000 | 12.000 | 9.000 | 33.99 | 3.78 |
| Cumulative | 50.000 | 50.000 | 50.000 | 46.000 | 175.29 | 3.81 |

Term : 2023 Spring

College

Law, Beasley School

Major

Law--Full Time

Student Type

Continuing Degree Seeking

Academic Standing

Not Calculated

Last Academic Standing

Not Calculated

| Subject | Course | Campus | Level | Title | Grade | Credit Hours | Quality Points | R | CEU Contact Hours |
|---------|--------|--------|-------|-------|-------|--------------|----------------|---|-------------------|
|---------|--------|--------|-------|-------|-------|--------------|----------------|---|-------------------|

| Subject | Course | Campus | Level | Title | Grade | Credit Hours | Quality Points | R | CEU Contact Hours |
|---------|--------|--------|-------|---------------------------------------|-------|--------------|----------------|---|-------------------|
| JUDO | 0400 | Main | LW | Administrative Law Green, R | A | 3.000 | 12.00 | | |
| JUDO | 0416 | Main | LW | Professional Responsibility Bachar, G | A- | 3.000 | 11.01 | | |
| JUDO | 0532 | Main | LW | Criminal Procedure I Ouziel, L | A | 3.000 | 12.00 | | |
| JUDO | 0558 | Main | LW | Intro to Trial Advocacy Scott, K | S+ | 3.000 | 0.00 | | |

| Term Totals | Attempt Hours | Passed Hours | CEU Hours | GPA Hours | Quality Points | GPA |
|--------------|---------------|--------------|-----------|-----------|----------------|------|
| Current Term | 12.000 | 12.000 | 12.000 | 9.000 | 35.01 | 3.89 |
| Cumulative | 62.000 | 62.000 | 62.000 | 55.000 | 210.30 | 3.82 |

Transcript Totals

| Transcript Totals - (Law) | Attempt Hours | Passed Hours | CEU Hours | GPA Hours | Quality Points | GPA |
|---------------------------|---------------|--------------|-----------|-----------|----------------|------|
| Total Institution | 62.000 | 62.000 | 62.000 | 55.000 | 210.30 | 3.82 |
| Total Transfer | 0.000 | 0.000 | 0.000 | 0.000 | 0.00 | 0.00 |
| Overall | 62.000 | 62.000 | 62.000 | 55.00 | 210.30 | 3.82 |

Course(s) in Progress

Term : 2023 Fall

College

Law, Beasley School

Major

Law--Full Time

Student Type

Continuing Degree Seeking

| Subject | Course | Campus | Level | Title | Credit Hours |
|---------|--------|--------|-------|---------------------------------|--------------|
| JUDO | 0542 | Main | LW | Federal Courts and Jurisdiction | 3.000 |
| JUDO | 0726 | Main | LW | Federal Judicial Clerkship | 3.000 |
| JUDO | 1039 | Main | LW | Race and the Law | 3.000 |

June 12, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

Asher Young is one of the most exceptional and successful members in his class, and he is certainly one of the most capable students I have known in several years. Asher was a double-major student-athlete at Wesleyan University, and he worked for several years at Bennett Midland, a strategic consultant that works exclusively with government agencies and non-profit entities. Asher was attracted to Temple Law School by one of our most prestigious merit scholarships, and his performance has fully justified those expectations: earning a 3.82 GPA despite the law school's 3.10 curve, chosen as an Articles Editor by his Law Review peers, and selected by faculty for the highly competitive Clerkship Honors Program. (In Asher's case, the latter will entail a year-long internship for Judge Marjorie Rendell of the Third Circuit.) I recommend Asher very highly for a post-graduation clerkship, and I hope you will give his application very close attention.

I know Asher from three contexts. First, he was a student in my sixty-five-person constitutional law class, which began on zoom before shifting to the classroom. He sat in the third row, slightly right of center, and was one of the most thoughtful participants in the class. Every week or two, he would stay after class for further discussion of some issue or question. These encounters quickly indicated Asher's extraordinary talent, maturity, and professionalism, all of which would be strongly confirmed by our further interactions in 2022-2023. It was no surprise that Asher's anonymously-graded exam was one of the top three in the large constitutional law course. Many aspects of his exam answer were excellent, but perhaps most extraordinary was his distinctive ability to perceive connections between technical doctrines and public values without any kind of distortion in his legal judgment.

Second, based on Asher's performance in constitutional law, I invited him to participate in an elite hand-picked Legal History Workshop. For several years, I have organized such "guided research assistant" seminars so that the law school's best students can develop stronger skills as editors and writers, ideally with the goal of preparing them for a judicial clerkship. I asked Asher and four other top-performing students to work with me in studying the history of affirmative action. Students were required to write papers on specifically assigned topics. The semester included four research-oriented meetings, with group discussion about each student's strategies, progress, and challenges. There were also four writing-oriented meetings, when students themselves led interactive discussions about one another's completed papers with close attention to composition, substance, and style.

I think that very few law schools anywhere in the country require high-performing students to share papers and comments with each other, yet I believe this process of writing, editing, and exchanging papers can yield extraordinary growth. I provided written comments on each paper, but the main goal was for students like Asher to become better editors of one another, so that they can more precisely edit their own writing. The seminar's grades were based not only on written products, but equally on the ability to generate productive suggestions and criticism for others. Asher researched topics and materials that were completely new and unfamiliar, including affirmative action in the military, Yale law's pathbreaking admissions policy during the 1960s, and social science about diversity in the judiciary. Asher had to plan ahead and be self-motivated, seeking help where necessary so that the work could be on point and efficient. Most of all, Asher had to deliver high-quality results on a very tight schedule, for a uniquely small audience of myself and strong student peers who were attentive, constructive, critical, and respectful.

Asher thrived and excelled in this unsheltered, high-pressure environment, maintaining a consistent focus on achieving even greater self-improvement. Likewise, I was able to see Asher perform across an exceedingly wide range of circumstances, including peer-interaction about substantively sensitive topics and productive responses to direct criticism. The breadth and depth of Asher's work during that semester represent the primary basis for my confidence and enthusiasm about his clerkship application. Asher earned a grade of A+ even when his work was directly compared to some of the law school's most talented students.

Third, Asher was a student in my fifty-eight-student administrative law, which was packed with talented students, including some of the most accomplished students from 2023's graduating class. Without making this letter any longer than necessary, Asher's performance was exactly as I would have expected from our prior experience, and it was especially similar to his performance in constitutional law. Asher was in no sense overactive with questions and discussions, yet he was very consistently excellent, navigating the peculiar and dynamic universe of administrative law with relentless curiosity, unwavering humility, and good cheer. Once again, Asher's anonymously-graded exam was among the top handful in an exceedingly talented class of students.

In eighteen years of teaching, thirty-seven of my research assistants have been fortunate to receive federal district clerkships, and nine have clerked in federal courts of appeals. Based on my experience, I believe that Asher's talent, diligence, and personality would position him near the very top of that accomplished group. I think Asher is an outstanding student, very easy to work with, who would be a superb asset in any judicial chambers. Long ago, I was a law clerk for Judge Louis Pollak and Judge Merrick Garland, and those experiences showed me the kind of skills and disposition that law clerks must have to succeed. I believe that Asher is a substantively excellent, personally delightful, zero-risk candidate for any high-pressure, high-quality legal workplace, especially including a judicial chambers. I hope you will give his application careful consideration, and if I can be helpful in any way, whether by email (green@temple.edu), cell phone (215-880-0374), or otherwise, I would be very happy to do that.

Green Craig - craig.green@temple.edu - 215-880-0374

Sincerely,

Craig Green

Professor of Law
Temple University

Green Craig - craig.green@temple.edu - 215-880-0374

June 12, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I write in enthusiastic support of Asher Young's application for a clerkship in your chambers. I am Associate Dean for Research and the I. Herman Stern Research Professor at Temple University's Beasley School of Law, where Asher was a student in my Civil Procedure I course in his first semester of law school. His performance in that course was outstanding, and he has continued to meet with me regularly to discuss his course selection and career plans. I have been continually impressed with Asher's superb analytical skills, his exceptional writing abilities, his highly developed organizational skills and self-starter nature, his close attention to detail, and his pleasant and professional demeanor. For all of these reasons, I invited Asher to act as a Teaching Assistant for my Civil Procedure I course this fall, selecting his application from a competitive process with many strong candidates. I can think of few more persuasive arguments that you should hire Asher to work in your chambers than to say that I have hired him myself.

From the first week of our Civil Procedure course, Asher served as a class leader in contextualizing and articulating challenging concepts during class discussion. He consistently raised insightful and probing questions that weaved together different sections of the course, providing clarity for his peers on how to approach complex legal questions with diligence and care. His writing in the course – consisting of a draft complaint, a practice midterm, and the final exam – exemplified these same qualities, demonstrating a thorough understanding of the material and exceptional analytic skill. As you know Civil Procedure I is one of the most challenging first year courses, and my goal as a professor is to consistently push students outside of their comfort zone. My final exam consists of a four-hour, complex hypothetical fact pattern that requires students to spot issues, identify the relevant legal rule, apply it to the salient facts, argue both sides, and organize their answer effectively, all under serious time pressure. Asher received one of the top three grades in the class of seventy students. I have since used his exam as a model answer for my Civil Procedure students because of its cogency and quality of analysis. I also awarded Asher Distinguished Class Performance to recognize his exceptional contributions to classroom discussions.

Since his first semester, I have continued to work with Asher as an academic advisor. I have been impressed by his organizational skills and attention to detail. As an advisor, I have met regularly with Asher to help tailor his courses to support his commitment to public service. Throughout these discussions, Asher has taken a measured and considered approach to academic planning, particularly in determining how to best pursue his interests in administrative law and public policy. Even alongside his law review and student organization responsibilities, Asher routinely provides detailed agendas and questions in advance of our meetings. Our conversations are thorough and nuanced, and Asher has shown himself as a self-starter and critical thinker throughout our work together.

Asher's work ethic and positive demeanor have made him a valuable part of the Temple Law community, and I am thrilled to receive his support next semester as a Civil Procedure Teaching Assistant. Asher's professionalism and commitment to serving others makes him well-prepared to help first-year students navigate difficult topics during their first semester of law school, and I very much look forward to working with him and seeing his own mentorship skills flourish next fall.

For all of these reasons, I believe that Asher would make an excellent law clerk: he has demonstrated outstanding analytical and writing abilities, strong attention to detail, and a robust work ethic. Please feel free to contact me at jayarn@temple.edu with any questions about Asher.

Very Truly Yours,

Jaya Ramji-Nogales
Associate Dean for Research
I. Herman Stern Research Professor

Jaya Ramji-Nogales - Jaya.Ramji-Nogales@temple.edu - 215-204-6430

June 12, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I write this letter in support of the clerkship application of Asher Young. I recommend Mr. Young enthusiastically and without reservation. Mr. Young is an extremely talented law student who engages the law with enthusiasm, professionalism, and a keen attention to detail. He is an excellent and persuasive writer and advocate with first-rate research and analytic skills. Mr. Young is also a leader in the Temple Law community and has been very involved with both the American Constitution Society and out student public interest organization.

I have been working with Mr. Young since his first year of law school when he applied for our highly prestigious Law & Public Policy (L&PP) Program. That year, we had three times as many applications as we had spots. As a L&PP Scholar, Mr. Young secured an internship with the Administrative Conference of the United States and wrote an excellent policy paper on federal regulatory reform. His paper was so well written and extensively researched that I recommended that he submit his paper to the annual meeting of the Law & Society Association, which is an interdisciplinary and international organization. I was not at all surprised when Mr. Young's paper was selected for the conference, and I am proud to report that he will have the opportunity to present his paper at the annual meeting in San Juan this summer on a panel that includes law professors and policy makers from around the world.

Since entering law school, Mr. Young has secured a number of highly prestigious internships where he has excelled, and next year he will be participating in our Federal Judicial Clerkship Clinical. Prior to law school, Mr. Young worked for a consulting firm in New York City that supported nonprofit organizations and government entities. Through his work at the consulting firm, Mr. Young gained problem solving experience and was involved with many innovative initiatives, including providing technical assistance to elected municipal officials who were developing equity and inclusion programs.

In short, Mr. Young is an exceptional law student. Please do not hesitate to contact me if there are any questions concerning his qualifications or abilities.

Sincerely,

Nancy J. Knauer
SHELLER PROFESSOR OF PUBLIC INTEREST LAW
DIRECTOR, LAW & PUBLIC POLICY PROGRAM

Nancy Knauer - nancy.knauer@temple.edu - 215-204-1688

Asher Young – Writing Sample

2121 Market St., Apt. 314, Philadelphia, PA 19103 • asher.young@temple.edu • (413)-687-5751

This writing sample is an excerpt of a court brief that I submitted for Legal Research & Writing II, where I was asked to represent a solo practitioner debt collection attorney facing a lawsuit under the federal Fair Debt Collection Practices Act (FDCPA). The table of authorities and statement of the case have been cut for length.

INTRODUCTION

Ms. Pearlman is entitled to summary judgment in this civil action under the federal Fair Debt Collection Practices Act (FDCPA). Ms. Freamon filed this action against Ms. Pearlman, seeking damages for Ms. Pearlman’s alleged violations of the FDCPA. The FDCPA specifically establishes a “bona fide error defense” where a debt collector may not be held liable for violating the Act if it shows its violation was not intentional, resulted from a bona fide error, and that it maintained procedures reasonably adapted to avoid any such error. This provision protects debtors by incentivizing debt collectors to employ due diligence practices to prevent them from violating the FDCPA. The provision also shields debt collectors from civil liability in cases where they attempted to comply with the statute but violated the Act unintentionally.

Ms. Freamon has not shown there is a genuine dispute of any material fact in this proceeding. Ms. Pearlman is familiar with the FDCPA and did not intend to violate the Act. Further, Ms. Pearlman’s alleged violation is a bona fide error because it resulted from a clerical error in the Philadelphia Court of Common Pleas’ online docket system. Ms. Pearlman also maintains procedures reasonably adapted to avoid making such errors, including several practices designed to avoid filing suits on uncollectible debts.

For the reasons that follow, Ms. Pearlman respectfully submits that she is entitled to summary judgment in this civil action as a matter of law.

Asher Young – Writing Sample

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QUESTION PRESENTED

Is Defendant entitled to summary judgment under 15 U.S.C. § 1692(k)(c) where her alleged violation was the result of a spelling error by the Philadelphia Court of Common Pleas, she did not intend to violate the FDCPA, and she maintained procedural safeguards reasonably adapted to avoid clerical errors?

(The procedural history and statement of facts have been cut for length.)

ARGUMENT

In 1977, Congress enacted the Fair Debt Collection Practices Act (“FDCPA”) to eliminate abusive debt collection practices, protect consumers, and to ensure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged. 15 U.S.C. § 1692. Specifically, 15 U.S.C. § 1692(k)(c) provides an affirmative defense for debt collectors who did not intend to violate the FDCPA, and whose alleged violations resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error. 15 U.S.C. § 1692(k)(c). The “bona fide error” defense is an important “safety hatch” of the FDCPA because the Act authorizes damages in excess of the actual cost incurred by the victim of a violation, providing an incentive for debt collectors to take necessary precautions to avoid such violations. *Ross v. RJM Acquisitions Funding LLC*, 480 F.3d 493, 495 (7th Cir. 2007).

To determine whether Ms. Pearlman, the defendant in this case, is entitled to summary judgment, this court must assess whether she is protected by the “bona fide error” defense. If this court finds Ms. Pearlman has shown by a preponderance of the evidence that (1) her alleged FDCPA violation was unintentional; (2) the alleged violation resulted from a bona fide error; and

Asher Young – Writing Sample

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(3) she maintains procedures reasonably adapted to avoid such errors, it must grant summary judgment to Ms. Pearlman.

To win summary judgment, Ms. Pearlman must show “that there is no genuine dispute as to any material fact and [she] is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a).

Summary judgment is proper where “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 2552 (1986). A fact is “material” under Rule 56 if its existence or nonexistence might impact the outcome of the suit under the applicable substantive law. *Santini v. Fuentes*, 795 F.3d 410, 416 (3d Cir. 2015) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)).

As the moving party, Ms. Pearlman’s burden in this case is to show that there is an “absence of evidence to support the nonmoving party’s case.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 106 S. Ct. 2548, 2554 (1986). Meanwhile, the nonmoving party, Ms. Freamon, must designate “specific facts showing that there is a genuine issue for trial.” *Id.* at 324.

Ms. Freamon has not introduced any evidence that shows any genuine issue of material fact as to whether Ms. Pearlman’s alleged FDCPA violation was unintentional, whether it was due to a bona fide error, or whether she maintains procedures reasonably adapted to protect against such errors. Whether a debt collector maintains “reasonably adapted” procedures is an objective inquiry which focuses on the orderliness and regularity of the debt collector’s error-prevention steps. *Johnson v. Riddle*, 443 F.3d 723, 729 (10th Cir. 2006); *Abdollahzadeh v. Mandarin Law Grp., LLP*, 922 F.3d 810, 817 (7th Cir. 2019) (quoting *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich, L.P.A.*, 559 U.S. 573, 587, 130 S. Ct. 1605, 1614-15 (2010)). There is no evidence in the record

Asher Young – Writing Sample

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that shows any genuine issue of material fact as to whether Ms. Pearlman regularly conducts computerized searches before filing debt collection suits, whether she maintains an agreement with Midland that all files it transmits for collection are legitimate and collectible debts, or whether she regularly attends the Pennsylvania Bar Institute's FDCPA training. Pearlman Dep. at 4-5. Thus, Ms. Pearlman is entitled to summary judgment under 15 U.S.C. § 1692(k)(c), absolving her of liability for any alleged FDCPA violations in the present case.

1. Ms. Pearlman is entitled to summary judgment under 15 U.S.C. § 1692(k)(c) because her alleged FDCPA violation was not intentional and resulted from a bona fide error.

A debt collector may not be held liable for violating the FDCPA if their violation was not intentional and resulted from a bona fide error, notwithstanding the maintenance of procedures reasonably adapted to avoid any such error. 15 U.S.C. § 1692(k)(c). To avail herself of this defense, Ms. Pearlman must establish by a preponderance of the evidence that (1) her alleged violation was unintentional, (2) her alleged violation resulted from a bona fide error, and (3) the bona fide error occurred despite procedures designed to avoid such errors. *Beck v. Maximus, Inc.*, 457 F.3d 291, 297-98 (3d Cir. 2006).

A debt collector only needs to show that its FDCPA violation was unintentional, not that its actions were unintentional. *Kort v. Diversified Collection Servs.*, 394 F.3d 530, 537 (7th Cir. 2005). To hold otherwise would effectively negate the bona fide error defense. *Lewis v. ACB Bus. Servs.*, 135 F.3d 389, 402 (6th Cir. 1998). In this case, Ms. Pearlman did not intend to violate the FDCPA, as evidenced by her withdrawing the debt collection suit against Ms. Freamon shortly after learning Midland had previously sued her on the same debt. Pearlman Dep. at 1.

Asher Young – Writing Sample

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The “bona fide error” included in 15 U.S.C. § 1692(k)(c) refers to “clerical or factual mistakes” because it is easier for debt collectors to implement procedures to avoid clerical errors than those applicable to legal reasoning. *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich, L.P.A.*, 559 U.S. 573, 587, 130 S. Ct. 1605, 1614-15 (2010). A clerical error is “merely of recitation, of the sort that a clerk or amanuensis might commit, mechanical in error.” *United States v. Clark*, 671 F. App’x 25, 25-26 (3d Cir. 2016). Because it was caused by a spelling error by the Philadelphia Court of Common Pleas in the case caption of the civil docket report for Midland’s prior lawsuit against Ms. Freamon, Ms. Pearlman’s error must be considered clerical in nature. Pierce Dep. at 2; Freamon Complaint at Ex. A.

1.1 Ms. Pearlman did not intend to violate the FDCPA and promptly withdrew the lawsuit when she learned Midland had previously sued Ms. Freamon on the same debt.

To avail herself of the “bona fide error” defense included in U.S.C. § 1692(k)(c), Ms. Pearlman “must only show that the [FDCPA] violation was unintentional, not that the [lawsuit] itself was unintentional.” *Lewis v. ACB Bus. Servs.*, 135 F.3d 389, 402 (6th Cir. 1998) (holding that defendant debt collector did not violate the FDCPA by making a collection call to debtor where debtor’s account had been miscoded as a new referral instead of a reopening). Deliberately taking a debt collection action against a debtor, despite its “intentional” nature, does not negate the bona fide error defense. *Kort v. Diversified Collection Servs.*, 394 F.3d 530, 537 (7th Cir. 2005). The Tenth Circuit has determined this to be “the only workable interpretation of the intent prong,” since determining “intent” ultimately “becomes principally a credibility question as to the defendants’ subjective intent to violate the [FDCPA].” *Johnson v. Riddle*, 443 F.3d 723, 728 (10th Cir. 2006).

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Ms. Pearlman is aware of the FDCPA and regularly attends the Pennsylvania Bar Association’s training on the statute. Pearlman Dep. at 4. She is also an active member of ACA International, a trade group that helps debt collectors comply with and implement the Act. Pearlman Dep. at 4; *FDCPA Compliance Center*, ACA International. (2022), <https://www.acainternational.org/compliance/fdcpa-compliance-center/>. When she learned that Midland had previously filed a lawsuit against Ms. Freamon on the same debt, Ms. Pearlman withdrew her complaint. Pearlman Dep. at 1. Further, Ms. Pearlman employs several procedures to avoid violating the FDCPA, and has previously declined to proceed with cases where Midland had previously sued a debtor. Pearlman Dep. 3-4.

Some courts have labeled the intent prong of the “bona fide error” defense a “subjective” test, instead choosing to focus their analysis on the latter two “objective” prongs of the test to determine whether a debt collector is entitled to the defense as a matter of law. *Johnson v. Riddle*, 443 F.3d 723, 728-29 (10th Cir. 2006). See also *Rush v. Portfolio Recovery Assocs. LLC*, 977 F. Supp. 2d 414, 427 (D.N.J. 2013). There is no evidence in the record to show Ms. Pearlman’s alleged FDCPA violation was intentional, and her dedication to FDCPA education and her actions as an attorney in other prospective debt collection lawsuits make it clear she did not intend to violate the Act in this case.

1.2 Ms. Pearlman’s alleged violation was the result of a clerical error in the Philadelphia Court of Common Pleas’ online docket system.

FDCPA violations are forgivable under U.S.C. § 1692(k)(c) where they result from “clerical or factual mistakes,” not mistakes of law. *Daubert v. NRA Grp., LLC*, 861 F.3d 382, 394 (3d Cir. 2017). A clerical mistake is one that “involves a failure to accurately record a statement or action

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by the court or one of the parties.” *United States v. Bennett*, 423 F.3d 271, 277-78 (3d Cir. 2005). The Supreme Court has specified that U.S.C. § 1692(k)(c) applies to clerical or factual mistakes because the statute attempts to evaluate “mechanical or other such ‘regular orderly’ steps to avoid mistakes—for instance, the kind of internal controls a debt collector might adopt to ensure its employees do not ... make false representations as to the amount of a debt.” *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich, L.P.A.*, 559 U.S. 573, 587, 130 S. Ct. 1605, 1614 (2010).

In this case, the Philadelphia Court of Common Pleas misspelled Ms. Freamon’s surname as “Freeman” in the case caption of the civil docket report for Midland’s prior lawsuit against Ms. Freamon. Pierce Dep. at 2; Freamon Complaint at Ex. A. This type of “failure to accurately record a statement ... by the court” is most aptly characterized as a clerical error. *Bennett*, 423 F.3d at 271. There is no evidence in the record that shows Ms. Pearlman committed any legal errors, defined by the Supreme Court as any error that is the “product of an attorney’s erroneous interpretation of the FDCPA, [such as misinterpreting the] Act’s definition of ‘debt collector.’” *Jerman*, 559 U.S. at 595. Rather, Ms. Pearlman’s alleged FDCPA violation was caused by a mere spelling discrepancy, making it a clerical error covered by U.S.C. § 1692(k)(c).

In *Ross*, the Seventh Circuit ruled in favor of a debt collector in a similar case involving spelling discrepancies. *Ross v. R7M Acquisitions Funding LLC*, 480 F.3d 493 (7th Cir. 2007) (granting summary judgment for defendant debt collector under the “bona fide error” defense where it mailed multiple dunning letters to a debtor before realizing the creditor had spelled the debtor’s name differently from the bankruptcy court, which had previously discharged the debt). Before filing a debt collection suit, Ms. Pearlman directs her legal assistant to search the debtor’s name in the relevant county’s court records to make sure they have not previously been sued. Pearlman Dep. at 3. Similarly, the debt collector in *Ross* was “mindful of its legal duty not to dun a

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discharged bankrupt, and to that end conducted a computerized search of bankruptcies.” *Ross*, 480 F.3d at 497. However, because the official bankruptcy records in *Ross* were filed under “Delisa Ross” and the name on the account sold to the debt collector was “Lisa Ross,” the debt collector’s computerized search failed to return any results showing the debt had been discharged. *Id.* at 497. Similarly, Ms. Pearlman’s search of Philadelphia court records was based on the spelling of Ms. Freamon’s name provided to her by Midland Funding. *Pierce Dep.* at 2.

In *Ross*, the Seventh Circuit found the debt collector’s spelling discrepancy to be a “bona fide error” and immediately proceeded to an analysis of whether its safeguard procedures were “reasonably adapted” to avoid any such error. *Ross*, 480 F.3d at 497. Ms. Pearlman’s alleged FDCPA violation was similarly due to the failure of a computerized search to return any prior cases involving the defendant debtor, and thus may be characterized similarly as a “clerical” and “bona fide” error.

2. Ms. Pearlman is entitled to summary judgment because she maintained procedures reasonably adapted to avoid unintentional errors that might result in FDCPA violations.

A debt collector may not be held liable for violating the FDCPA where she did not intend to violate the FDCPA, and where her alleged violations resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error. 15 U.S.C. § 1692(k)(c). The “bona fide error” defense does not require a debt collector to employ “state of the art” procedures to avoid errors that might violate the FDCPA. *Ross*, 480 F.3d at 498. Rather, the FDCPA “only requires collectors to adopt reasonable procedures” to avoid such mistakes. *Hyman v. Tate*, 362 F.3d 965, 968 (7th Cir. 2004).

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In this case, the court must determine whether Ms. Pearlman adopted “reasonable procedures” to avoid making clerical errors. Ms. Pearlman’s safeguard procedures include: (1) working with her legal assistant to carefully review Philadelphia’s court records for the last names of all potential defendants; (2) holding an agreement with Midland Funding that all of its debt collection suits are based on legitimate and collectible debts with no bankruptcy discharges or any other type of problem; and (3) attending annual FDCPA trainings conducted by the Pennsylvania Bar Institute, the official Continuing Legal Education Arm of the Pennsylvania Bar Association. Pearlman Dep. at 4; *About PBI*, Pennsylvania Bar Institute. (March 2022), <https://www.pbi.org/about-pbi>.

In assessing Ms. Pearlman’s procedures, the court should take guidance from the Supreme Court and focus “on the orderliness and regularity of the debt collector’s error-prevention steps, not on the number or complexity of those steps.” *Abdollahzadeh v. Mandarich Law Grp., LLP*, 922 F.3d 810, 817 (7th Cir. 2019) (quoting *Jerman*, 599 U.S. at 587) (holding the bona fide error defense precluded debt collector’s liability for FDCPA violations because its violations were due to incorrect information received from the debt buyer, despite reasonable, regular, and orderly error-prevention procedures aimed at avoiding untimely collection attempts). Regardless of whether a debt collector’s procedures are “imperfect” or “unquestionably simple,” the court may still find they qualify under 15 U.S.C. § 1692(k)(c) if they are regular and orderly error-prevention procedures. *Abdollahzadeh*, 922 F.3d at 817.

Ms. Pearlman regularly conducts orderly error-prevention procedures ahead of filing debt collection cases. Pearlman Dep. at 3-4. She directs her legal assistant, Mr. Pierce, to carefully review the relevant court dockets before filing debt collection suits to make sure there are no previous cases filed against that debtor. Pearlman Dep. at 3-4. In his deposition, Mr. Pierce also

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described his duties in detail in a “typical debt collection case,” including searching the computerized court records in whatever county the debtor lives to make sure there are no bankruptcy filings by the debtor or previous cases with the debtor. *Pierce Dep.* at 1-2. Additionally, since debt collection cases became the “main part” of Ms. Pearlman’s practice in 2020, she has regularly attended the Pennsylvania Bar Institute’s August FDCPA training. *Pearlman Dep.* at 5.

Conducting a computerized search for bankruptcies under a debtor’s name is a procedure “reasonably adapted” to avoid clerical errors that might violate the FDCPA. *Ross v. RJM Acquisitions Funding LLC*, 480 F.3d 493 (7th Cir. 2007). Further, in *Hyman*, the Seventh Circuit granted summary judgment for the debt collector where it relied on its creditor not to refer debtors who were in bankruptcy, and where it immediately ceased collection efforts once it learned of any bankruptcy filings. *Hyman v. Tate*, 362 F.3d 965 (7th Cir. 2004). The bona fide error defense is also available to debt collectors who reasonably rely on the opinion of an organization with expertise in the relevant area of law. *Ruth v. Triumph P'Ships*, 577 F.3d 790, 805 (7th Cir. 2009).

2.1 Ms. Pearlman directs her legal assistant to carefully review Philadelphia court records for the last names of all potential defendants to make sure she will not violate the FDPCA by filing a lawsuit to collect an unenforceable debt.

In determining whether a debt collector’s precautions are “reasonable,” courts conduct an “objective” inquiry into whether any precautions were actually implemented, and whether such precautions were reasonably adapted to avoid the specific error at issue. *Rush v. Portfolio Recovery Assocs. LLC*, 977 F. Supp. 2d 414, 427 (D.N.J. 2013). Notably, the bona fide error defense does

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not require debt collectors to take every conceivable precaution to avoid errors, but rather only requires reasonable precautions. *Beck v. Maximus, Inc.*, 457 F.3d 291, 299 (3d Cir. 2006).

A computerized search for bankruptcies is a reasonable procedure to avoid dunning a discharged debt. *Ross v. RfM Acquisitions Funding LLC*, 480 F.3d 493, 497 (7th Cir. 2007). In *Ross*, the attorney representing the debt collector outsourced its computerized search for bankruptcies under the debtor's name to another firm. *Id.* at 497. In determining this procedure to be reasonable, the court weighed the cost of investing in more advanced search procedures against the "slight aggregate harms resulting from the handful of dunning letters that modest procedures occasionally let through the sieve." *Id.* at 498.

Ms. Pearlman is aware that Midland Funding files many lawsuits, and she undertakes computerized search procedures like those in *Ross* to avoid any errors that would violate the FDCPA. Pearlman Dep. at 3. Ms. Pearlman directs her legal assistant, Mr. Wendell Pierce, to carefully review the dockets from the Philadelphia Court of Common Pleas to avoid suing debtors whom Midland Funding has already sued. Pearlman Dep. at 3-4. Specifically, Ms. Pearlman directs Mr. Pierce to run the defendant's name through the dockets to make sure there are no previous cases filed against that defendant. Pearlman Dep. at 3. As recently as October 2021, Ms. Pearlman successfully used her procedure to avoid filing a lawsuit against a debtor who had previously been sued by Midland Funding. Pearlman Dep. at 3. Given her success in preventing lawsuits from being filed against debtors previously sued by Midland, and based on the court's determination in *Ross*, Ms. Pearlman's search procedure should objectively be considered a "reasonable procedure" to avoid making such an error.

In *Ross*, the Seventh Circuit also held "reasonable" procedures cannot be equated to "state of the art" procedures "at the technological frontier." *Ross*, 480 F.3d at 498. The Seventh Circuit

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reasoned that if debt collectors were required to employ such “state of the art” procedures, those who failed to immediately purchase more advanced technological functions would be sued for committing unintentional and bona fide errors whenever a more powerful search program came on the market. *Id.* at 498.

The court in *Ross* derived its reasoning from *Hyman v. Tate*, where a debt collector was protected by the bona fide error defense even where it did not establish proactive procedures, like checking court records, to ensure the accounts it received for collection were not in bankruptcy. *Hyman v. Tate*, 362 F.3d 965, 968 (7th Cir. 2004). Because the debt collector in *Hyman* had other procedures in place similar to Ms. Pearlman’s, such as stopping collection activities in the event an unintentional error occurred, the debt collector was not required to employ an “expensive review system” to avail itself of the bona fide error defense. *Id.* at 968.

Although Ms. Pearlman shares her office expenses with two other attorneys, Mr. Chris Partlow and Mr. Odell Watkins, she effectively works as a solo practitioner by billing her own clients and keeping her own fees. Pearlman Dep. at 3. Ms. Pearlman already pays \$300 per month to access a subscription to Lexis, which she uses to access court records from counties outside of Philadelphia. Pearlman Dep. at 3. Meanwhile, it is free to access online docket records from the Philadelphia Court of Common Pleas through its official website. Pearlman Dep. at 3.

Ms. Pearlman does not have a subscription to Bloomberg Law, which also offers access to Philadelphia’s court records. Pearlman Dep. at 4. Bloomberg Law does not publish its monthly subscription costs; however, as of August 2015, Bloomberg was estimated to cost a solo practitioner approximately \$475 per month, with a minimum contract length of two years. Lisa Solomon, *Choosing the Right Legal Research Tool for Your Firm*, MyCase, at 4. (August 2015), https://info.abovethelaw.com/hubfs/MyCase_eBook_Choosing_the_Right_Legal_Research_T

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ool_for_Your_Firm.pdf. Based on this estimate, accessing Bloomberg Law would more than double Ms. Pearlman’s current subscription expenses. This additional cost should be considered the type of “expensive review system” explicitly not required by the court in *Hyman*. *Hyman*, 362 F.3d at 968. Thus, Ms. Pearlman’s failure to subscribe to Bloomberg Law should not negate her “bona fide error” defense in this case.

In *Ross*, the court determined that even if a more complex search algorithm would have helped the debt collector find the debtor’s name, “it would not make [the debtor’s] case.” *Ross*, 480 F.3d at 497. A debt collector’s procedures must only be considered “reasonably adapted” to avoid unintentional and bona fide errors, rather than “state of the art” practices. *Id.* at 497-498. Although Bloomberg Law offers a more advanced Boolean search function not available in Philadelphia’s online docket, there is nothing in the record that suggests this function would have found the spelling error that caused Ms. Pearlman’s alleged FDCPA violation. Lisa Solomon, *Choosing the Right Legal Research Tool for Your Firm*, MyCase, at 4. (August 2015), https://info.abovethelaw.com/hubfs/MyCase_eBook_Choosing_the_Right_Legal_Research_Tool_for_Your_Firm.pdf. Given the regularity and orderliness of her existing computerized search procedures, Ms. Pearlman is protected by the “bona fide error” defense as a matter of law in this case.

2.2 Ms. Pearlman maintains an agreement with Midland that all files it transmits for collection are legitimate, collectible debts with no bankruptcy discharges or any other type of problem.

The bona fide error defense “does not demand perfection” of debt collectors and does not require debt collectors to independently verify the validity of the debt. *Abdollahzadeh v. Mandarin Law Grp., LLP*, 922 F.3d 810, 817 (7th Cir. 2019) (citing *Hyman*, 362 F.3d at 968). Instead, a debt collector has developed a “reasonably adapted procedure” where it has an “understanding with

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the firms that sell it debts for collection that they would not knowingly sell” discharged or otherwise uncollectible debts. *Ross*, 480 F.3d at 497. In this case, Ms. Pearlman has an agreement with Midland that all files it transmits for collection are legitimate, collectible debts with no bankruptcy discharges or any other type of problem. Pearlman Dep. at 4. Combined with her other procedures, such as computerized searches of debtors’ names and attending FDCPA trainings, this agreement qualifies as a procedure reasonably adapted to avoid clerical errors.

In *Abdollahzadeh*, the Seventh Circuit held that a debt collector law firm was protected by the “bona fide error” defense even where it relied on account information provided by its creditor client that “consistently (though incorrectly) identified the last-payment date” of the debt in question. *Abdollahzadeh*, 922 F.3d at 816. The plaintiff debtor in *Abdollahzadeh* unsuccessfully argued that the “bona fide error” defense does not protect debt collectors who unreasonably rely on a creditor’s representation of debts. *Id.* at 814 (citing *McCullough v. Johnson, Rodenburg & Lauinger, LLC*, 637 F.3d 939, 949 (9th Cir. 2011)). Specifically, the debtor in *Abdollahzadeh* relied on *McCullough* to argue that the presence of an “accuracy disclaimer” in the debt collector’s agreement with its client made it unreasonable as a matter of law for the debt collector to rely on its client’s data. *Abdollahzadeh*, 922 F.3d at 816. The Seventh Circuit, however, rejected this argument, pointing out that the debt collector in *McCullough* relied on an email from its creditor that contradicted previous information in the creditor’s own account file, rather than simply relying on incorrect information originally transmitted by the creditor. *Abdollahzadeh*, 922 F.3d at 816 (citing *McCullough*, 637 F.3d at 945).

In this case, there is nothing in the record to suggest there is any sort of “accuracy disclaimer” in Ms. Pearlman’s agreement with Midland, which the Ninth Circuit in *McCullough* cited as a factor in determining the debt collector's reliance on its creditor to be "unreasonable as a matter

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of law.” *McCullough*, 637 F.3d at 949. Further, like the debt collector in *Abdollahzadeh*, Ms. Pearlman did not receive any communication from Midland that contradicted information in its own account file; instead, she merely relied on the account information itself. *Abdollahzadeh*, 922 F.3d at 816; Pearlman Dep. at 2.

The Ninth Circuit generally holds debt collectors to a stricter standard, explaining that debt collectors have an “affirmative obligation” to maintain reasonable procedures beyond relying on a creditor’s representation of debts. *Reichert v. Nat’l Credit Sys.*, 531 F.3d 1002, 1004 (9th Cir. 2008) (ruling debt collector could not rely solely on creditor’s provision of accurate information in the past as a substitute for the maintenance of adequate procedures to avoid future mistakes). However, even under this heightened standard, Ms. Pearlman would be entitled to the “bona fide error” defense because she maintains other procedures reasonably adapted to avoid discoverable errors, such as her computerized searches and regular attendance at FDCPA trainings. Pearlman Dep. at 4-5.

In *Reichert*, the debt collector unsuccessfully argued that the creditor’s submission of accurate information in the past entitled the debt collector to reasonably rely on the creditor’s representations of debts. *Reichert*, 531 F.3d at 1004. There was no evidence the debt collector in *Reichert* maintained any safeguard procedures other than a mere “conclusory declaration” stating that it maintained such procedures. *Id.* at 1007. Ms. Pearlman’s case differs substantially, given that she reviews local court dockets to confirm whether Midland’s debts are collectible, and she regularly attends FDCPA trainings. Pearlman Dep. at 4-5. The evidence in the record shows that Ms. Pearlman’s safeguard practices go well above the “mere assertion” of reasonably adapted procedures offered by the debt collector in *Reichert*. *Reichert*, 531 F.3d at 1007. Even under strict standards, Ms. Pearlman’s procedures show she is entitled to the “bona fide error” defense.

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2.3. Ms. Pearlman regularly attends FDCPA trainings conducted by the Pennsylvania Bar Institute, whose programs are taught by leading legal experts in their field.

While not dispositive on its own, attendance at training seminars is considered a “reasonable procedure” that helps debt collectors avoid errors and omissions that could result in an FDCPA violation. *Jenkins v. Heintz*, 124 F.3d 824, 834 (7th Cir. 1997). Even in cases where the court has ruled in favor of plaintiff debtors, training seminars are cited as “procedures which may be reasonably adapted to avoiding a clerical error.” *Ruth v. Triumph P'Ships*, 577 F.3d 790, 804 (7th Cir. 2009) (quoting *Johnson v. Riddle*, 443 F.3d 723, 730 (10th Cir. 2006)).

Ms. Pearlman’s case is distinguishable from both *Ruth* and *Johnson*, where the courts ruled that attending training seminars “cannot shield an attorney from liability for legal errors because such clerical procedures are mostly about the mechanics for collecting debts.” *Ruth*, 577 F.3d at 804 (quoting *Johnson*, 443 F.3d at 730). Unlike the debt collectors who committed legal errors in *Ruth* and *Johnson*, Ms. Pearlman committed a clerical error when she did not find the spelling discrepancy between Midland’s referral and the case caption in the online docket system for the Philadelphia Court of Common Pleas. Pierce Dep. at 2.

Ms. Pearlman has regularly attended the Pennsylvania Bar Institute’s annual FDCPA training over the past two years. Pearlman Dep. at 5. The Pennsylvania Bar Institute is the continuing legal education arm of the Pennsylvania Bar Association, and its programs are taught by legal professionals who are widely recognized as the leading experts in their field. *About PBI*, Pennsylvania Bar Institute. (March 2022), <https://www.pbi.org/about-pbi>. Additionally, Ms. Pearlman helped train her legal assistant by showing him how to look up names in the computer indexes to check whether debtors have previously been sued. Pierce Dep. at 3. This type of in-

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house training, combined with Ms. Pearlman's attendance at the Pennsylvania Bar Institute's training sessions, constitutes a procedure reasonably adapted to avoid clerical errors.

Unlike the defendant debt collector in *Ruth*, Ms. Pearlman also does not need to prove she "reasonably relied on" an attorney or organization with expertise in the relevant area of law. *Ruth*, 577 F.3d at 804. Rather, she only must prove that attending a training seminar was a "regular orderly" step to avoid a clerical mistake. *Jerman*, 559 U.S. at 587. Based on her consistent attendance at the Pennsylvania Bar Institute's FDCPA trainings over the last two years, Ms. Pearlman's training routines should be considered "regular orderly" steps that are reasonably adapted to avoid making clerical errors. Pearlman Dep. at 5.

CONCLUSION

Ms. Pearlman has met her burden of proving that there are no genuine issues of material fact as to whether her alleged FDCPA violation was unintentional, whether it resulted from a bona fide error, and whether she maintains procedures reasonably adapted to avoid any such error. Based on these undisputed facts, Ms. Pearlman is entitled to the bona fide error defense under 15 U.S.C. § 1692(k)(c) and is entitled to summary judgment as a matter of law. For these reasons, Ms. Pearlman requests the court grant its Motion for Summary Judgment and enter judgment for Ms. Pearlman on this issue.

Applicant Details

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Applicant Education

BA/BS From **James Madison University**
 Date of BA/BS **December 2015**
 JD/LLB From **Louisiana State University, Paul M. Hebert Law Center**
<http://www.law.lsu.edu>
 Date of JD/LLB **May 12, 2024**
 Class Rank **30%**
 Law Review/Journal **Yes**
 Journal(s) **The Journal of Civil Law Studies**
 Moot Court Experience **Yes**
 Moot Court Name(s) **Tullis Moot Court**
Judge John R Brown Admiralty Moot Court

Bar Admission

Prior Judicial Experience

| | |
|--------------------------------------|------------|
| Judicial Internships/ Externships | Yes |
| Post-graduate Judicial Law Clerk | No |

Specialized Work Experience

Recommenders

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This applicant has certified that all data entered in this profile and any application documents are true and correct.

Evan Young
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3/31/2023

Judge Jamar K. Walker
United States District Court for the Eastern District of Virginia
600 Granby St Ste 193A,
Norfolk, VA 23510

Dear Judge Walker,

I am writing to express my strong interest in the Federal Judicial Clerkship position with the Eastern District of Virginia for the upcoming term. As a recent law school graduate with a deep passion for the law and a demonstrated commitment to public service, I believe that I possess the qualities and skills necessary to excel in this prestigious position.

Throughout law school, I have been committed to achieving academic excellence and building a strong foundation in legal research, writing, and analysis. I have also been deeply involved in extracurricular activities and pro bono work, which has allowed me to develop a wide range of skills and experiences that I believe would be valuable in a judicial clerkship role.

Specifically, my experience includes competing in both external and internal moot court competitions, interning at a federal district court and a state appellate court, and working as an editor of a peer-reviewed journal. These experiences have honed my analytical and writing abilities, as well as my ability to work effectively in a team-oriented environment.

In addition to my academic and professional achievements, I am confident that I possess the personal qualities necessary to be an effective clerk. I have strong interpersonal skills, and I can communicate effectively with a wide range of individuals, from litigants to attorneys to court personnel. I am also extremely organized and detail-oriented, which I believe would be valuable in managing complex legal cases and maintaining accurate records.

Finally, I am deeply committed to public service and to the ideals of justice and fairness that underlie our legal system. I believe that a judicial clerkship would provide me with a unique opportunity to contribute to the legal profession, to learn from accomplished judges, and to make a meaningful difference in the lives of the individuals who appear before the court.

Thank you for considering my application. I am excited about the possibility of contributing to the work of the Federal District Court, and I look forward to the opportunity to discuss my qualifications in more detail.

Sincerely,

Evan Young

Evan Young

5500 Perkins Rd., Baton Rouge, LA 70808, (804) 301-3475, eyoun43@lsu.edu

Education

Paul M. Hebert Law Center, Louisiana State University, Baton Rouge, LA

J.D./ D.C.L. Candidate, May 2024

GPA: 3.254, Rank: 30% (66/216)

- International Law Student Society: President
- Tullis Moot Court Semifinalist: 4th place Best Oralist
- LSU Admiralty External Team
- Assistant Managing Editor for the Journal for Civil Law Studies
- Cali Award: Administrative Law

James Madison University, Harrisonburg, VA

B.A., Modern Foreign Language, Concentration, Italian, December 2015

- Mahatma Gandhi Center for Global Nonviolence
- Madison Marketing Association
- Italian Club, Treasurer
- Study abroad program: Dante Alighieri Università per Stranieri di Reggio Calabria, Italy, Summer 2015

Experience

Louisiana First Circuit Court of Appeals, Baton Rouge, LA

Intern, September 2022 - Present

- Observe oral arguments
- Research and prepare memorandum for staff attorneys
- Cite check draft opinions with the record and existing law
- Assist the Judge and staff attorneys with reviewing writ applications

United States District Court for the Middle District of Louisiana, Baton Rouge, LA

Extern, May 2022- July 2022

- Worked closely with law clerks to cite check rulings that would be used by the judge
- Researched and prepared a memorandum for a motion for summary judgement on administrative appeal exhaustion under the Prison Litigation Reform Act
- Researched 5th Circuit precedent for protected speech of a government employee
- Evaluated and summarized parties' arguments in preparation for a breach of contract case
- Observed oral arguments, evidentiary hearings, jury selection, and pre- trial conferences

Republic National Distribution Company, Ashland, VA

Sales Representative, May 2017 - June 2021

- Analyzed sales data to create personalized sales plans for accounts
- Consulted with account managers to better understand issues the account might have
- Made sales suggestions based on sales data and consultation
- Met with competing sales reps to work out compromises that benefitted all parties
- Summarized sales trends and account issues to upper management to help create better sales programs

Duoc UC Universidad Católica, Santiago, Chile

Professor of English, January 2016– December 2016

- Created engaging lesson plans; managed classes of 20+ students; presented class lectures to students

Skills

Spanish – B2 (Upper Intermediate)

Italian – A2 (Upper Basic)

Proficient in Microsoft 360

Proficient with Lexis Nexis and Westlaw

Community Services

FNE International, Nicaragua – Volunteer Home Builder

**LOUISIANA STATE UNIVERSITY
COLLEGE RECORD**

PAGE 1

EVAN YOUNG

ISSUED 01/09/2023 TO: STUDENT

DEGREES AWARDED:

12/2015 BA
JAMES MADISON UNIVERSITY

| DEPT | CRSE | GR | CARR | EARN | QPTS |
|------|------|----|------|------|------|
|------|------|----|------|------|------|

LOUISIANA STATE UNIVERSITY
1ST SEM 2021-2022

| | | | | | |
|----------|-----|------|------|-------|----------|
| LAW 5001 | P | | 3.00 | | |
| LAW 5003 | 3.3 | 3.00 | 3.00 | 9.90 | 26/ 77 T |
| LAW 5007 | 3.5 | 2.00 | 2.00 | 7.00 | 13/ 77 T |
| LAW 5009 | 3.4 | 3.00 | 3.00 | 10.20 | 17/ 77 T |
| LAW 5015 | 2.5 | 3.00 | 3.00 | 7.50 | 25/ 39 |
| LAW 5021 | 3.0 | 2.00 | 2.00 | 6.00 | |

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|---------|------------|------------|-------|-------|-------|------|
| SEC RNK | 34/ 77 | SEMESTER | 13.00 | 16.00 | 40.60 | 3.12 |
| CLS RNK | 91/232 TIE | LSU SYSTEM | 13.00 | 16.00 | 40.60 | 3.12 |
| | | CUMULATIVE | 13.00 | 16.00 | 40.60 | 3.12 |

LOUISIANA STATE UNIVERSITY
2ND SEM 2021-2022

| | | | | | |
|----------|-----|------|------|-------|----------|
| LAW 5002 | 3.3 | 3.00 | 3.00 | 9.90 | 14/ 39 T |
| LAW 5006 | 2.9 | 3.00 | 3.00 | 8.70 | 41/ 76 T |
| LAW 5008 | 3.0 | 3.00 | 3.00 | 9.00 | 45/ 77 T |
| LAW 5010 | 3.5 | 3.00 | 3.00 | 10.50 | 7/ 76 T |
| LAW 5017 | 3.4 | 2.00 | 2.00 | 6.80 | 18/ 75 T |
| LAW 5022 | 2.9 | 2.00 | 2.00 | 5.80 | |

| | | | | | | |
|---------|------------|------------|-------|-------|-------|------|
| SEC RNK | 30/ 76 | SEMESTER | 16.00 | 16.00 | 50.70 | 3.16 |
| CLS RNK | 78/227 TIE | LSU SYSTEM | 29.00 | 32.00 | 91.30 | 3.14 |
| | | CUMULATIVE | 29.00 | 32.00 | 91.30 | 3.14 |

| DEPT | CRSE | GR | CARR | EARN | QPTS |
|------|------|----|------|------|------|
|------|------|----|------|------|------|

LOUISIANA STATE UNIVERSITY
3RD SEM 2021-2022

| | | | | | |
|----------|-----|------|------|-------|----------|
| LAW 5402 | 4.0 | 3.00 | 3.00 | 12.00 | 1/ 89 T |
| LAW 5605 | 3.0 | 3.00 | 3.00 | 9.00 | 26/ 48 T |
| LAW 5907 | P | | 3.00 | | |

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|---------|--------|------------|-------|-------|--------|------|
| CLS RNK | 73/224 | SEMESTER | 6.00 | 9.00 | 21.00 | 3.50 |
| | | LSU SYSTEM | 35.00 | 41.00 | 112.30 | 3.20 |
| | | CUMULATIVE | 35.00 | 41.00 | 112.30 | 3.20 |

LOUISIANA STATE UNIVERSITY
1ST SEM 2022-2023

| | | | | | |
|----------|-----|------|------|-------|----------|
| LAW 5206 | 3.2 | 3.00 | 3.00 | 9.60 | |
| LAW 5424 | 3.7 | 3.00 | 3.00 | 11.10 | 4/ 35 T |
| LAW 5447 | 3.3 | 2.00 | 2.00 | 6.60 | 19/ 67 T |
| LAW 5530 | 3.0 | 3.00 | 3.00 | 9.00 | 28/ 55 T |
| LAW 5888 | 3.8 | 2.00 | 2.00 | 7.60 | |
| LAW 6003 | P | | 3.00 | | |

| | | | | | | |
|---------|--------|------------|-------|-------|--------|------|
| CLS RNK | 66/216 | SEMESTER | 13.00 | 16.00 | 43.90 | 3.37 |
| | | LSU SYSTEM | 48.00 | 57.00 | 156.20 | 3.25 |
| | | CUMULATIVE | 48.00 | 57.00 | 156.20 | 3.25 |

LOUISIANA STATE UNIVERSITY
2ND SEM 2022-2023

| | | | | | |
|----------|----|------|--|--|--|
| LAW 5311 | IP | 3.00 | | | |
| LAW 5417 | IP | 2.00 | | | |
| LAW 5461 | IP | 3.00 | | | |
| LAW 5721 | IP | 2.00 | | | |
| LAW 5775 | IP | 3.00 | | | |

CURRENTLY ENROLLED 13.00

PENDING DEGREE PROGRAMS:

DEGREE SEQ NBR: 02
L MAJOR JDCL 2022 1S/2022

*****END OF ACADEMIC RECORD*****

*** NOTE THIS IS NOT AN OFFICIAL TRANSCRIPT ***

Official Transcript

Institution Info: James Madison University
South Main Street
Harrisonburg, VA 22807
United States

Name: Young, Evan Daniel
Student ID: 108540972
Address: 9505 Carterwood Road
Richmond, VA 23229
United States

Recipient: EVAN DANIEL YOUNG

Print Date: 07/15/2022

Degrees Awarded

Degree: Bachelor of Arts
Confir Date: 12/19/2015
Plan: Major in Modern Foreign Languages
Sub-Plan: Concentration in Italian

Academic Program

Program: Undergraduate
Modern Foreign Lang - BA Major
Italian Concentration

Beginning of Undergraduate Record

Fall Semester 2012

Transfer Credit from Virginia Community College System (II)

Applied Toward Undergraduate

| Course | Description | Attempted | Earned | Grade | Points |
|--------------------------------|------------------------------|------------------|---------------|--------------|---------------|
| GBIO 103 | CONTEMPORARY BIOLOGY | 0.00 | 3.00 | CR | 0.000 |
| GECON 200 | INTRO MACROECONOMICS | 0.00 | 3.00 | CR | 0.000 |
| GHIST 102 | WORLD HISTORY SINCE 1500 | 0.00 | 3.00 | CR | 0.000 |
| GPOSC 225 | U.S. GOVERNMENT | 0.00 | 3.00 | CR | 0.000 |
| GSCI 101 | PHYS, CHEM & HUMAN EXP | 0.00 | 3.00 | CR | 0.000 |
| GSCI 104 | SCIENTIFIC PERSPECTIVES | 0.00 | 1.00 | CR | 0.000 |
| GSCI 104 | SCIENTIFIC PERSPECTIVES | 0.00 | 1.00 | CR | 0.000 |
| GWRTC 103 | CRITICAL READING AND WRITING | 0.00 | 3.00 | CR | 0.000 |
| MATH 220 | ELEMENTARY STATISTICS | 0.00 | 3.00 | CR | 0.000 |
| WRTC 100 | READING AND WRITING WORKSHOP | 0.00 | 3.00 | CR | 0.000 |
| Course Trans GPA: 0.000 | | Attempted | Earned | Grade | Points |
| | | 0.00 | 26.00 | | 0.000 |
| GCOR 123 | FUND HUMAN COMM: GROUP PRES | 3.00 | 3.00 | B- | 8.100 |
| GPHIL 120 | CRITICAL THINKING | 3.00 | 3.00 | D | 3.000 |
| ITAL 101 | ELEMENTARY ITALIAN I | 4.00 | 4.00 | B+ | 13.200 |
| MATH 103 | NATURE OF MATHEMATICS | 3.00 | 3.00 | C | 6.000 |
| POSC 295 | RESEARCH METHODS IN POSC | 4.00 | 4.00 | C+ | 9.200 |

| | | | | | |
|------------------------|-------|--------------------|-------|-------|--------|
| Term GPA | 2.323 | Term Totals | 17.00 | 17.00 | 39.500 |
| Cum GPA | 2.323 | Cum Totals | 17.00 | 43.00 | 39.500 |
| Academic Good Standing | | | | | |

Spring Semester 2013

| Course | Description | Attempted | Earned | Grade | Points |
|----------|------------------------------|-----------|--------|-------|--------|
| COB 191 | BUSINESS STATISTICS | 3.00 | 3.00 | C | 6.000 |
| COB 204 | COMPUTER INFORMATION SYSTEMS | 3.00 | 3.00 | C | 6.000 |
| ECON 201 | PRIN OF ECON (MICRO) | 3.00 | 3.00 | D | 3.000 |
| ITAL 102 | ELEMENTARY ITALIAN II | 4.00 | 4.00 | A | 16.000 |

| | | | | | |
|------------------------|-------|--------------------|-------|-------|--------|
| Term GPA | 2.384 | Term Totals | 13.00 | 13.00 | 31.000 |
| Cum GPA | 2.350 | Cum Totals | 30.00 | 56.00 | 70.500 |
| Academic Good Standing | | | | | |

Fall Semester 2013

| Course | Description | Attempted | Earned | Grade | Points |
|-----------|-------------------------|-----------|--------|-------|--------|
| COB 218 | LEGAL ENVIR OF BUSINESS | 3.00 | 3.00 | B+ | 9.900 |
| COB 241 | FINANCIAL ACCOUNTING | 3.00 | 3.00 | C | 6.000 |
| GARTH 205 | PREHIST TO RENAISSANCE | 3.00 | 3.00 | C | 6.000 |
| GISAT 151 | TOPICS IN APPLIED CALC | 4.00 | 4.00 | D | 4.000 |
| ITAL 231 | INTERMEDIATE ITALIAN I | 3.00 | 3.00 | A- | 11.100 |

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|------------------------|-------|--------------------|-------|-------|---------|
| Term GPA | 2.312 | Term Totals | 16.00 | 16.00 | 37.000 |
| Cum GPA | 2.336 | Cum Totals | 46.00 | 72.00 | 107.500 |
| Academic Good Standing | | | | | |

Spring Semester 2014

| Course | Description | Attempted | Earned | Grade | Points |
|----------|-------------------------|-----------|--------|-------|--------|
| COB 202 | INTERPERSONAL SKILLS | 3.00 | 3.00 | B+ | 9.900 |
| COB 242 | MANAGERIAL ACCOUNTING | 3.00 | 3.00 | D- | 2.100 |
| COB 291 | INTRO TO MANAGEMENT SCI | 3.00 | 3.00 | D | 3.000 |
| ITAL 232 | INTERMEDIATE ITALIAN II | 3.00 | 3.00 | B- | 8.100 |

| | | | | | |
|------------------------|-------|--------------------|-------|-------|---------|
| Term GPA | 1.925 | Term Totals | 12.00 | 12.00 | 23.100 |
| Cum GPA | 2.251 | Cum Totals | 58.00 | 84.00 | 130.600 |
| Academic Good Standing | | | | | |

Fall Semester 2014

| Course | Description | Attempted | Earned | Grade | Points |
|-----------|------------------------------|-----------|--------|-------|--------|
| COB 204 | COMPUTER INFORMATION SYSTEMS | 3.00 | 3.00 | B | 9.000 |
| Repeated: | Repeat Credit | | | | |
| COB 242 | MANAGERIAL ACCOUNTING | 3.00 | 3.00 | B | 9.000 |
| Repeated: | Repeat Forgiveness | | | | |
| ECON 201 | PRIN OF ECON (MICRO) | 3.00 | 3.00 | B | 9.000 |
| Repeated: | Repeat Forgiveness | | | | |
| GENG 239 | STUDIES IN WORLD LITERATURE | 3.00 | 3.00 | D | 3.000 |
| ITAL 300 | GRAMMAR AND COMMUNICATION | 3.00 | 3.00 | B | 9.000 |

| | | | | | |
|------------------------|-------|--------------------|-------|-------|---------|
| Term GPA | 2.600 | Term Totals | 15.00 | 15.00 | 39.000 |
| Cum GPA | 2.455 | Cum Totals | 67.00 | 90.00 | 164.500 |
| Academic Good Standing | | | | | |

Spring Semester 2015

| Course | Description | Attempted | Earned | Grade | Points |
|----------|--------------------------------|-----------|--------|-------|--------|
| ITAL 308 | CONTEMPORARY ITAL CIVILIZATION | 3.00 | 3.00 | A- | 11.100 |
| ITAL 330 | BUSINESS ITALIAN | 3.00 | 3.00 | A | 12.000 |
| ITAL 335 | INTRO TO ITALIAN LITERATURE | 3.00 | 3.00 | A- | 11.100 |
| ITAL 465 | ITALIAN CINEMA | 3.00 | 3.00 | A | 12.000 |

| | | | <u>Attempted</u> | <u>Earned</u> | <u>Points</u> |
|------------------------|-------------|-------------|------------------|---------------|---------------|
| Term GPA | 3.850 | Term Totals | 12.00 | 12.00 | 46.200 |
| Cum GPA | 2.667 | Cum Totals | 79.00 | 102.00 | 210.700 |
| Term Honor: | Dean's List | | | | |
| Academic Good Standing | | | | | |

Summer Session 2015

Transfer Credit from J SARGEANT REYNOLDS COMMUNITY COLLEGE, VA (II)

Applied Toward Undergraduate

| Course | Description | Attempted | Earned | Grade | Points |
|--------------------------------|--------------------|------------------|---------------|--------------|---------------|
| HTH 100 | PERSONAL WELLNESS | 0.00 | 3.00 | CR | 0.000 |
| PSYC 101 | GENERAL PSYCHOLOGY | 0.00 | 3.00 | CR | 0.000 |
| Course Trans GPA: 0.000 | | Attempted | Earned | Grade | Points |
| | | 0.00 | 6.00 | | 0.000 |

| Course | Description | Attempted | Earned | Grade | Points |
|--|-------------------------------|-----------|--------|-------|--------|
| ITAL 375 | BUSINESS & SOCIETY IN ITALY | 3.00 | 3.00 | B+ | 9.900 |
| ITAL 446 | SPECIAL TOPICS IN ITALIAN LIT | 3.00 | 3.00 | A | 12.000 |
| Topic: INTRO TO ITALIAN POETRY PT I | | | | | |

| | | | | | |
|------------------------|-------|--------------------|-------|--------|---------|
| Term GPA | 3.650 | Term Totals | 6.00 | 6.00 | 21.900 |
| Cum GPA | 2.736 | Cum Totals | 85.00 | 114.00 | 232.600 |
| Academic Good Standing | | | | | |

Fall Semester 2015

Transfer Credit from RADFORD UNIVERSITY, VA (IV)

Applied Toward Undergraduate

| Course | Description | Attempted | Earned | Grade | Points |
|--------------------------------|----------------------------|------------------|---------------|--------------|---------------|
| PHIL 101 | INTRODUCTION TO PHILOSOPHY | 0.00 | 3.00 | CR | 0.000 |
| Course Trans GPA: 0.000 | | Attempted | Earned | Grade | Points |
| | | 0.00 | 3.00 | | 0.000 |

| Course | Description | Attempted | Earned | Grade | Points |
|---|--------------------------------|-----------|--------|-------|--------|
| ITAL 307 | ITALIAN CIVILIZATION | 3.00 | 3.00 | C+ | 6.900 |
| ITAL 320 | ORAL AND WRITTEN COMMUNICATION | 3.00 | 3.00 | A- | 11.100 |
| ITAL 435 | TRANSLATION STRATEGIES | 3.00 | 3.00 | B | 9.000 |
| ITAL 446 | SPECIAL TOPICS IN ITALIAN LIT | 3.00 | 3.00 | A- | 11.100 |
| Topic: INTRO TO ITALIAN POETRY PT II | | | | | |
| SPAN 232 | INTERMEDIATE SPANISH II | 3.00 | 3.00 | A- | 11.100 |

| | | | | | |
|------------------------|-------|--------------------|--------|--------|---------|
| Term GPA | 3.280 | Term Totals | 15.00 | 15.00 | 49.200 |
| Cum GPA | 2.818 | Cum Totals | 100.00 | 132.00 | 281.800 |
| Academic Good Standing | | | | | |

Undergraduate Career Totals

| | | | | | |
|----------------|-------|-------------------|--------|--------|---------|
| Cum GPA | 2.818 | Cum Totals | 100.00 | 132.00 | 281.800 |
|----------------|-------|-------------------|--------|--------|---------|

Non-Course Milestones

General Education Competency R
Status: Completed
Milestone Level: ISST Standard
Milestone Title: Gened ISST

End of Official Transcript

Such as M. L. H. to
James Madison University
Registrar



Faculty

June 23, 2023

Judge Jamar K. Walker
Eastern District of Virginia
600 Granby Street
Norfolk, VA 23510

Dear Judge Walker,

I write to recommend my student, Evan Young, for a clerkship with you. Evan is a second year law student at LSU and I have had the pleasure of teaching him two classes: Maritime Torts, last fall, and Constitutional Law 14th Amendment, this semester. I have also had the opportunity to talk to him a great deal outside the classroom and judge a practice round of the LSU Admiralty Moot Court Team of which he is a member. Evan will be an outstanding clerk and a fantastic lawyer.

In Maritime Torts, Evan was always prepared, asked fantastic questions, and always showed that he had thought carefully about the material. The class was one of the most accomplished I have ever had; it was loaded with high achievers who have done very well in law school. Evan was more than up to the task and he did extremely well, receiving a 3.7 (out of 4.0), one of the highest grades in the class.

This Spring in Constitutional Law 14th Amendment he is once again proving himself a fine student and a great person to have in class. Evan is once again totally prepared and absorbed in the material. He asks probing questions that manifest his careful considerations of what we are covering.

As the Admiralty Moot Court team prepared for their competition, Evan frequently asked me about questions he was being asked in practice and potential responses. The issue involved marine insurance and my conversations with him about the obligation of utmost good faith in maritime insurance contracts taught me a lot more than I was able to teach him. When I judged their final practice round before the competition I was incredibly impressed by Evan's performance. He was conversational and respectful; he was professional and persuasive; he was, in short, skilled beyond his years. In the competition his team made it to the national quarterfinals and he received a perfect score on one of his rounds.

Personally, Evan is thoughtful, likeable, and friendly. LSU has an LL.M. program designed for foreign lawyers; it is a program which enriches our community. And Evan should be the ambassador of the program. I had two LL.M. students from Africa in my maritime Torts class and Evan made sure I met them both, that they had appropriate materials, and secondary sources. During their first days at LSU Law, he guided them and welcomed them. I remain most impressed.

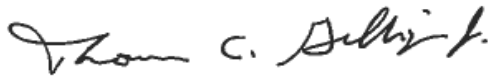
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In addition, to all this, Evan is the President of our student International Law Society, reached our internal Tullis Moot Court semifinals, is the Assistant Editor of the Journal for Civil Law Studies, and won a CALI Award in International Law. He has had field placements in the Louisiana First Court of Appeal and the U.S. District Court for the Middle District.

In conclusion, I think the world of Evan Young and I recommend him wholeheartedly.

Sincerely,

A handwritten signature in black ink, reading "Thomas C. Galligan, Jr." in a cursive script.

Thomas C. Galligan, Jr.
Dodson & Hooks Endowed Chair in Maritime Law, LSU Law Center
James Huntington and Patricia Kleinpeter Odom Professor of Law, LSU Law Center
LSU President Emeritus

TCG:pah

June 19, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I am a maritime defense attorney and equity partner at NeunerPate in Lafayette, LA. It has been a privilege to coach Evan Young through LSU Law in the John R. Brown Admiralty Moot Court Competition. I have enjoyed getting to know Evan both professionally and personally. I look forward to coaching him again this year as the team travels to compete in Seattle during his third year of law school.

Evan is destined to be a great litigator. He understands the importance of extensive preparation, which is reflected in the quality of his oral advocacy and measured demeanor. His research and writing skills also showcase his attention to detail. I believe that he will be an excellent law clerk. Because he is a bit older than the average law student, he is also much more mature than most applicants for this position. I think that he will be a great asset to your judicial staff.

If you have any questions or wish to discuss my experience with Evan, please do not hesitate to contact me.

PHILLIP M. SMITH
ATTORNEY

NeunerPate
P: 337 237 7000 D: 337 272 0392
C: 337 256 0977 F: 337 233 9450
psmith@NeunerPate.com

One Petroleum Center
1001 West Pinhook Road, Suite 200
Lafayette, LA 70503

Phillip Smith - psmith@neunerpate.com - 3372560977

QUESTIONS PRESENTED

Whether the longstanding federal maritime duty under *Uberrimae Fidei* is an entrenched part of federal maritime law, invoking an application of federal law?

Statement of the Case

Emily Morgan (Ms. Morgan) had an insurance policy on her yacht, the San Jacinto. On November 8, 2016, Ms. Morgan was operating her yacht, the San Jacinto, in Galveston Bay when she allided with a pier. (R. 13a). The allision caused minor damage to her yacht. *Id.* Yellow Rose Insurance Co., Inc (Yellow Rose) paid for the damages (minus the policy deductible). *Id.* Ms. Morgan purchased another yacht called the Channel Point. *Id.* Yellow Rose offered Ms. Morgan favorable terms based on their amicable business relationship with her. (R. 14a).

On May 5, 2018, Ms. Morgan formally filled out her application for marine insurance offered by Yellow Rose. *Id.* When filling out the company's standard form insurance application, Ms. Morgan concedes she made a material omission by failing to list the allision involving the San Jacinto when answering the application's question about any previous losses involving a vessel owned by Morgan. (R. 15a).

While hosting a New Year's party for friends on the San Jacinto in Galveston on January 4, 2019, a fire broke out at the Kemah marina damaging the Channel Point. It was declared a total loss. (R. 14a). Morgan filed a claim with Yellow Rose. *Id.* On March 18, 2019,

Yellow Rose declined to pay for the loss and sued Ms. Morgan, arguing that it was entitled to avoid the policy due to Ms. Morgan's material omission and returned the premium. *Id.* On April 16, 2019, Ms. Morgan filed a counterclaim for breach of contract. *Id.*

At trial, the district court for the Southern District of Texas found that under fifth circuit precedent in *Albany Ins. Co. v. Anh Thi Kieu*, 927 F.2d 882 (5th Cir. 1991), the doctrine of Uberrimae Fidei is not entrenched in general maritime law and under the Supreme Court's decision in *Wilburn Boat Co. v. Fireman's Fund Ins. Co.*, 348 U.S. 310, 75 S. Ct. 368, 99 L. Ed. 337 (1955), Texas state law should apply. (R. 15a). The Texas supreme court recognized the reliance requirement in marine insurance claims in *Mayes v. Massachusetts Mut. Life Ins. Co.*, 608 S.W.2d 612 (Tex. 1980). (R. 16a). The District Court said that because Yellow Rose conceded that it was unable to prove that it relied on Ms. Morgan's failure to report the San Jacinto allision when it agreed to issue the policy, Yellow Rose had no right to avoid the policy and thus breached its contract with Ms. Morgan. *Id.* Yellow Rose appealed. (R. 1b)

On appeal, the Fifth Circuit overturned *Anh Thi Kieu* and said that Uberrimae Fidei is entrenched in federal maritime law and, thus, federal law should apply. (R. 1a). The Court also held that Uberrimae Fidei did not require Yellow Rose to rely on the omission to void the policy. (R. 6a). The Fifth Circuit reversed the district court. *Id.* Ms. Morgan appealed, and the Supreme Court granted certiorari. (R. 1b).

Argument

Federal law applies to the issue between Yellow Rose Insurance and Emily Morgan.

I. Congress has not precluded federal law from governing marine insurance.

The petitioner cites the McCarran- Ferguson Act (15 U.S.C. § 1011) (the Act) as a federal precedent precluding the federal courts from making maritime law that governs marine insurance. But it is a misreading of the Act. Congress said that federal law shall not apply to the business of insurance *unless* Congress explicitly said so. *Id.* Congress passed The Act to protect the business of insurance from anti-trust investigations after this Court in *United States v. S.-E. Underwriters Ass'n*, 322 U.S. 533, 553, 64 S. Ct. 1162, 88 L. Ed. 1440 (1944) found that insurance companies that did business across state lines were engaged in interstate commerce and thus subject to federal law. However, Congress passed the Act intending to exclude insurance companies from specific federal statutes. Therefore, the purpose of the Act is to act as a cut-out, not a directive.

In the second section of the Act, Congress explicitly said that state law should govern the insurance business. 15 USC § 1012(a). However, subsections (a) and (b) need to be read in tandem, where Congress explicitly laid out the federal statutes that would not apply to the business of insurance. 15 USC § 1012(b). Therefore § 1012 resets the regulation of insurance to the pre- *S.-E. Underwriters Ass'n* status quo. Since no federal statute applies, State law governs the business of insurance. The Act did not say that federal Courts could not make a law regulating marine insurance.

This Court in *Wilburn Boat Co. v. Fireman's Fund Ins. Co.*, 348 U.S. 310, 75 S. Ct. 368, 99 L. Ed. 337 (1955) construed the scope of the Act and specifically held that the McCarran-

Ferguson Act is inapplicable to marine insurance policies. "Congress has not taken over the regulation of marine insurance contracts and has not dealt with the effect of marine insurance warranties at all; hence there is no possible question here of conflict between state law and any federal statute." *Id* at 314

The *Wilburn Boat* Court went on to say that since there was no act of Congress, the Supreme Court sitting in admiralty was free to make new rules governing marine insurance. As "States can no more override such judicial rules validly fashioned than they can override Acts of Congress." *Id.* at 348.

That interpretation is supported by Thomas Schoenbaum and the 9th circuit in *Certain Underwriters at Lloyds, London v. Inlet Fisheries Inc.*, 518 F.3d 645, 649–50 (9th Cir. 2008). When that Court said, "*Wilburn Boat* does not change the initial inquiry of the courts in interpreting a policy of marine insurance to determine whether there is an established federal maritime law rule." Thomas J. Schoenbaum, *Admiralty and Maritime law* § 17–6; *Inlet Fisheries Inc.* at 649. Courts still follow the *Jensen* analysis. Courts will still look to see if there is an act of Congress. Is there a federally established maritime law? If not, is there a need for a uniform rule? *S. Pac. Co. v. Jensen*, 244 U.S. 205, 37 S. Ct. 524, 61 L. Ed. 1086 (1917).

Because Congress has yet to speak on the issue of marine insurance regulation, this Court can fill the gap as it has done before. See *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 90 S. Ct. 1772, 26 L. Ed. 2d 339 (1970); *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 128 S. Ct. 2605, 171 L. Ed. 2d 570 (2008); *E. River S.S. Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 106 S. Ct. 2295, 90 L. Ed. 2d 865 (1986); *Seas Shipping Co. v. Sieracki*, 328 U.S. 85, 66 S. Ct. 872, 90 L. Ed. 1099 (1946).

II. Uberrimae Fidei is an entrenched federal precedent.

As noted above, the Court in *Wilburn Boat* went through an established process of determining if they should make an admiralty rule. Finding no applicable act of Congress, the Court examined the circuit courts and various state laws to determine if the strict adherence to warranties was an established federal precedent. *Wilburn Boat Co.*, 348 U.S. 310. While the Court ultimately found that there was no need to make a federal maritime rule because only two circuits had found that strict adherence to warranties as a part of maritime law, and there was little state law addressing the matter. The doctrine of Uberrimae Fidei has far more authority to back it.

First, Uberrimae Fidei has a long history in American law. In the 1828 case of *McLanahan v. Universal Ins. Co.*, 26 U.S. 170, 7 L. Ed. 98 (1828), Justice Story is credited with importing Uberrimae Fidei from English common law when he said that an insurance contract was "a contract Uberrimae Fidei." *Id.* at 185. A Hundred years later, this Court again applied Uberrimae Fidei in *Stipcich v. Metro. Life Ins. Co.*, 277 U.S. 311, 48 S. Ct. 512, 72 L. Ed. 895 (1928). This Court declared that Uberrimae Fidei was an entrenched part of insurance law. *Id.* Even though this was a pre-*Erie* case applying federal general insurance law, the doctrine still applied to insurance under federal law. Because marine insurance contracts fall under maritime law, which is federal law, Uberrimae Fidei governs marine insurance. Thus, Uberrimae Fidei is a part of general admiralty law.

Second, the First, Second, Third, Eighth, Ninth, Eleventh and now the Fifth¹ circuits all found that Uberrimae Fidei is an established federal precedent. The circuit courts take different approaches to determine if a doctrine is an "established federal precedent." The Ninth Circuit

¹ Note: the fictional Fifth circuit in the moot court problem overturned *Anh Thi Kieu* and said that Uberrimae Fidei was "entrenched."

requires that a "rule be sufficiently longstanding and accepted within admiralty law that it can be said to be 'established.'" *Inlet Fisheries*, 518 F.3d at 650. The Fifth Circuit previously required the admiralty rule to be "entrenched federal precedent." *Albany Ins. Co. v. Anh Thi Kieu*, 927 F.2d 882, 888 (5th Cir.1991). Meanwhile, the Second Circuit looks to whether the rule is "well established," *Puritan Ins. Co. v. Eagle S.S. Co. S.A.*, 779 F.2d 866, 870 (2d Cir.1985), and the Eleventh Circuit determines whether the rule is "well settled," *Steelmet, Inc. v. Caribe Towing Corp.*, 747 F.2d 689, 695 (11th Cir. 1984). While these Circuits differ somewhat in their precise language, the idea behind the analysis is consistent. *A.G.F. Marine Aviation & Transp. v. Cassin*, 544 F.3d 255, 262 (3d Cir. 2008).

Lastly, while most states do not follow *Uberrimae Fidei*, California, New York, and Florida, three of the biggest states in maritime commerce, have codified the doctrine. See *Certain Underwriters at Lloyd's v. Montford*, No. CV 92-233 LGB, 1993 WL 590136 (C.D. Cal. July 12, 1993) (under California law, a yacht policy is void from inception due to misrepresentation of the year of construction and purchase price); *Royal Ins. Co. of Am. v. H.A. Fleming*, 1986 A.M.C. 2077(M.D. Fla. 1985); *Albany Ins. Co. v. Wisniewski*, 579 F. Supp. 1004 (D.R.I. 1984). The consensus amongst the circuits should lend substantial weight to the finding that *Uberrimae Fidei* is an established federal precedent. However, the need for a uniform maritime rule for *Uberrimae Fidei* should also weigh in favor of its recognition by this Court.

III. Uberrimae Fidei needs a uniform rule to promote better maritime commerce and a more efficient marine insurance market.

Uniformity would help facilitate maritime commerce because it would limit disruptions in vessel operations. Commercial vessels undergo inspections yearly to maintain certification by the Coast Guard. 46 C.F.R. § 2.01-5. Therefore, vessel owners already have detailed information about their vessels. It is logical and economical to allow insurance companies to rely on that information. Similarly, requiring insurance companies to verify the same data would require another ship inspection. That ship may not be in a neighboring port but is sometimes on the other side of the world.

Insurance company verification creates two inefficiencies. First, the inspection itself would be expensive. It would require the insurance company to send an inspector to another country or hire a local inspector to verify information that the Coast Guard already has. The higher costs on the insurance company ultimately reverberate back to the assured in the form of higher premiums. Second, the inspector would need time to reinspect the vessel. That means the vessel would be docked, unable to participate in maritime commerce merely to have the same information reviewed. Taking the vessel out of maritime commerce reduces its profitability. Thus, the vessel owners suffer the dual punishment of having to pay higher insurance premiums and a reduction in the profitability of their vessels.

Uberrimae Fidei helps to create a more efficient marine insurance market by reducing moral hazard and adverse selection. It reduces adverse selection because it helps aggregate uncorrelated losses in two ways: first, the accuracy and prediction of the risk generated by everyone holding an independent and identically valued risk will improve as the number of those individuals increases. Second, the ability to predict and reduce the practical risk level will also improve as the number of statistically independent risks grows. Therefore, aggregation of risks is critical to risk reduction efforts in the insurance market. Elizabeth Germano, *A Law and*

Economics Analysis of the Duty of Utmost Good Faith (Uberrimae Fidei) in Marine Insurance Law for Protection and Indemnity Clubs, 47 St. Mary's L.J. 727, 781 (2016) (Germano).

Risk aggregation allows insurance companies to separate the assured into the proper risk pools. Segregation can reduce statistical risk variance below that of a more broadly aggregated pool by separating the high-risk insured from the low-risk insured. This reduction in statistical variance reduces the overall pool risk level, improves predictive accuracy under the law of large numbers, and, as a result, reduces aggregate insurance premiums. By setting an insurance premium that most accurately reflects the insured's risk, risk segregation can reduce the underlying level of losses. This helps the insured internalize the cost of their risky behavior because they can decide how much to engage in based on the insurance cost. As a result, the insurance company can charge the low-risk insured lower premiums than the high-risk insured. *Id.* at 782.

There are sound economic reasons to use Uberrimae Fidei. "Parties to contracts need to know the risks they are facing to create a contract that maximizes mutual value to them." Knowing the material facts is essential to place the insured into the appropriate risk pool. Misrepresentation defeats the insurer's efforts to segregate risks and increase insurance availability. Finally, this rule is "cost effective in terms of maximizing the possibilities of insurance" because "the potential policyholder is in the best position to know" the relevant material facts. *Id.* at 786.

Finally, a uniform rule for Uberrimae Fidei would create predictability where there is currently none. This case before the Court started because the two parties could not decide how Uberrimae Fidei applies to their contract. Uncertainty means litigation, and that means higher

legal fees. Consumers ultimately pay higher legal fees in the form of higher premiums. A uniform rule would reduce legal and premium costs for the assured.

Conclusion

Uberrimae Fidei ultimately ensures low premiums for the assured because it encourages an efficient marine insurance marketplace and allows commercial vessels to engage in more maritime commerce. If this Court finds that Uberrimae Fidei is not an established federal precedent, this Court would be punishing a large class of prudent consumers of marine insurance all because of one admittedly sympathetic plaintiff. Any rule this Court makes today will affect not only recreational vessels but commercial vessels as well. This Court should affirm the 5th circuit's ruling and formally recognize what all the other circuits have, that Uberrimae Fidei is an established federal precedent.

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